Supreme Court, U.S.
FILED

951987 JUN 10 1996

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAYTON HUDSON DEPARTMENT STORE COMPANY,
A DIVISION OF DAYTON HUDSON CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

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140 pp

QUESTION PRESENTED

WHETHER THE CURRENT STANDARD OF THE NATIONAL LABOR RELATIONS BOARD, WHICH PERMITS GROSS MISREPRESENTATIONS BY CAMPAIGNING PARTIES PRIOR TO UNION REPRESENTATION ELECTIONS, PROTECTS THE EMPLOYEES' RIGHT TO FREE AND FAIR ELECTIONS AS REQUIRED BY THE NATIONAL LABOR RELATIONS ACT.

PARTIES AND RULE 29.6 STATEMENT

This Petition is filed on behalf of Dayton Hudson Department Store Company, a division of Dayton Hudson Corporation ("Hudson's"). The Respondent is the National Labor Relations Board ("the Board"). The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) ("the UAW" or "the Union"), was an intervening party in the proceedings before the Court of Appeals.

Dayton Hudson Corporation has no parent or non-wholly owned subsidiary companies.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

Dayton Hudson Department Store Company, a division of Dayton Hudson Corporation ("Hudson's"), Petitioner herein, respectfully petitions for certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Decision of the United States Court of Appeals for the Sixth Circuit affirming the Decision of the Board, entered on March 29, 1996 and reported at 79 F.3d 546 (6th Cir. 1996), is reprinted at 1a of the Appendix.

The Hearing Officer's Report and Recommendations on Hudson's Objections to the Election, issued on June 21, 1990 and unreported, is reprinted at 13a of the Appendix. The unreported Decision of the Board, adopting the Hearing Officer's findings and

certifying the UAW as the exclusive bargaining representative of an appropriate unit, was issued on December 26, 1990 and is reprinted at 27a of the Appendix. The Decision and Order of the Board, issued on May 15, 1991 and reported at 302 NLRB 982, which ordered Hudson's to bargain with the Union, is reprinted at 30a of the Appendix.

The first Decision of the United States Court of Appeals for the Sixth Circuit in this matter, which remanded the case to the Board, issued on March 1, 1993 and reported at 987 F.2d 359 (6th Cir. 1993), is reprinted at 39a of the Appendix.

The Decision of the Administrative Law Judge following remand, issued on March 25, 1994, and unreported, is reprinted at 56a of the Appendix. The Board's Supplemental Decision and Order, issued on August 18, 1994, and reported at 314 NLRB 795, is reprinted at 105a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 2350.

STATUTORY PROVISIONS INVOLVED

This action involves provisions of the National Labor Relations Act of 1947, as amended, including 29 U.S.C. §§ 157-159, which provide as follows:

> **§ 157. Right of employees as to organization, collective bargaining, etc.**
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...

§ 158. Unfair Labor Practices

(a) Unfair Labor Practices by employer.

It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of its employees, subject to the provisions of section 159(a) of this title.

* * *

§ 159. Representatives and elections

* * *

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section,....

* * *

> . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.
>
> * * *
>
> (4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

STATEMENT OF THE CASE

A. *Nature of the Case*

Petitioner seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit which enforced the Supplemental Decision and Order of the National Labor Relations Board finding that Petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act by reason of its refusal to bargain with the Union. Specifically, Petitioner requests that this Court review the Court of Appeals' determination that the UAW's distribution of a Union organizer's letter to employee voters immediately prior to a representation election, which (a) falsely claimed to be a letter from Fellow Workers, (b) contained a gross misrepresentation concerning a material issue and (c) was distributed so close to the election that

Petitioner could not effectively reply, did not require a new election.[1]

B. *Statement of Material Facts*

Dayton Hudson Corporation operates numerous retail department stores. Approximately twenty of these facilities are Hudson's Department Stores, one of which, a large store located in Westland, Michigan, is involved in this proceeding.

On May 11, 1990, the National Labor Relations Board conducted a secret ballot election among employees within an appropriate bargaining unit at Hudson's Westland store. In that election, 274 employees voted for the UAW, 8 voted for an intervening union, United Food & Commercial Workers, Local 876, and 179 voted against both participating labor organizations.

On the day of the election, Hudson's became aware of a letter which had been mailed to employee voters. This letter, dated May 8, 1990, and received by employee voters shortly before the election, was addressed "Dear Fellow Hudson's Employee" and was signed "Your Fellow Workers." The letter actually had been prepared and sent by a professional UAW organizer, Maureen Fitzsimmons.

The letter asserted that the 1989 profits of the Westland store were in excess of $60 million dollars, and as both the Administrative Law Judge and the Court of Appeals found, this

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[1] The Court of Appeals properly exercised jurisdiction pursuant to 29 U.S.C. § 160(e) and (f).

claim was a gross misrepresentation. In pertinent part, the letter read:

May 8, 1990

Dear Fellow Hudson's Employee,

During the union election campaign, Dayton Hudson has distorted the facts to lead us away from the real issues. It's important that we understand Dayton's scare tactics and not be swayed by their "give us another chance" promise.

* * *

One of the particularly insulting arguments of management has been that better wages and benefits for us would jeopardize operations and profits. Dayton Hudson is the most profitable of the retail industry giants. So profitable that they; (1) bought out Marshall/Field's for over one billion dollars; (2) built a multitude of Mervyn's and Target stores in Michigan costing millions and millions of dollars ***(3) claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year,*** and (4) pay huge and excessive wage, bonus and stock option compensation packages to their Minneapolis management, and peanuts to us.

* * *

By our joining the UAW, we guarantee ourselves a voice in our future. On May 11, vote to give yourself a

meaningful voice in decisions that impact your life — VOTE YES FOR THE UAW.

In Solidarity,

Your Fellow Workers
The Westland Employees
Organizing Committee

(Emphasis added) (Full text of letter reprinted at 109a of the Appendix).

In truth, the Westland store's profits in 1989 were $1.4 million; total store sales in 1989 were only $52.5 million.

Compounding the seriousness of this deception was the purported source of the letter. Although authored by a professional Union organizer, it was addressed "Dear Fellow Hudson's Employee" and was signed "Your Fellow Workers." Many statements and opinions contained in the letter appear to be those of employees garnered from personal experience.

Hudson's had no meaningful opportunity to respond to this letter before the election. The voters went to the ballot box with this gross misrepresentation concerning an important issue fresh in their minds.

C. *Rulings Below*

On May 18, 1990, Hudson's filed timely Objections to the UAW's pre-election misconduct. Hudson's position was that the letter, allegedly from Fellow Workers and mailed to employee voters immediately prior to the election, leaving Hudson's no opportunity to respond, had intentionally misrepresented the Westland store's profits and thus had interfered with the election process.

A Hearing Officer of Region Seven of the Board conducted a hearing on June 6, 1990, and thereafter recommended that

Hudson's Objections be overruled (13a of the Appendix). Hudson's filed Exceptions to the Hearing Officer's Report and Recommendations but, on December 26, 1990, the Board issued its Decision, adopting the Hearing Officer's findings and certifying the UAW as the exclusive representative of the Westland bargaining unit (27a of the Appendix).[2] The Hearing Officer and the Board relied entirely upon the Board's decision in *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982). In *Midland*, reversing its position for the third time in five years, the Board had held that, except in the case of forgery, elections will not be set aside solely because of campaign misrepresentations and deceit.

Hudson's refused to be bound by the results of the election, which it did not believe had been fairly conducted. On February 1, 1991, the UAW filed a Charge with the Board alleging that Hudson's was engaging in an unfair labor practice by refusing to bargain. The Board issued its Decision and Order, reported at 302 N.L.R.B. 982 (May 15, 1991), finding that all issues raised by Hudson's were or could have been litigated in the prior representation proceeding and ordering Hudson's to bargain with the Union upon request (30a of the Appendix).

Hudson's thereafter filed a Petition for Review and to Set Aside the Order of the Board with the United States Court of Appeals for the Sixth Circuit, requesting that the Court overturn the Board's Decision and Order. The Board filed a Cross-Application for Enforcement.[3]

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[2] On February 7, 1991, the Board issued an Order Vacating the Decision and Certification of December 26, 1990 because of inadvertent errors which appeared therein relative to the composition of the bargaining unit. The second Order reiterated the Board's acceptance of the Hearing Officer's findings, and certified the UAW as the exclusive representative of the amended bargaining unit.

[3] A second objection was involved at this stage of the proceeding, i.e., that the UAW had used forged authorization cards in its campaign to portray a false image of employee support. Petitioner does not seek to have this Court review this issue.

On March 1, 1993, the Court of Appeals remanded the case to the Board and, *inter alia*, instructed the Board to re-evaluate its position relative to the UAW's misrepresentation of store profits in light of the Sixth Circuit's prior decision in *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), *cert. den.*, 469 U.S. 1208 (1985). *Dayton Hudson Dep't Store Co. v. NLRB*, 987 F.2d 359 (6th Cir. 1993) (39a of the Appendix). The Court reiterated its "reluctance to be bound by the *Midland National Life* rule in every case" stating:

> [W]e continue to adhere to *Van Dorn* as representing a narrow but appropriate limitation on the expansive rule announced in *Midland Life* — namely, that where the pervasiveness of misrepresentation or the artfulness of deception during an election campaign renders employees so unable to separate truth from untruth that their free and fair choice is affected, an election must be set aside even in the absence of proof that forgery has occurred.

987 F.2d at 365.

Pursuant to the Court of Appeals' remand, an Administrative Law Judge conducted a hearing, commencing on January 18, 1994. On March 24, 1994, the Judge issued his Decision and Recommended Order which, although acknowledging that the UAW had engaged in a "gross misrepresentation" immediately prior to the election, rejected Hudson's position (56a of the Appendix).

Hudson's thereafter filed Exceptions to the Decision and Recommended Order but, on August 18, 1994, the Board issued its Supplemental Decision and Order, summarily affirming the Judge's rulings, findings, and conclusions, and adopting his Recommended Order. 314 N.L.R.B. 795 (105a of the Appendix).

On August 30, 1994, Hudson's filed a Petition to Review and Set Aside the Order with the Court of Appeals and the Board thereafter filed a Cross-Application for Enforcement.

On March 29, 1996, the United States Court of Appeals for the Sixth Circuit issued its Decision enforcing the Board's Order. *Dayton Hudson Dep't. Store Co. v. NLRB*, 79 F.3d 546 (6th Cir., 1996) (1a of the Appendix). With respect to the gross misrepresentation contained in the UAW's last minute letter, deceptively styled as a communication to a Fellow Hudson's Employee from Fellow Workers, the Court acknowledged that the statement concerning Hudson's profitability was an "extreme exaggeration" and that some employees may have been misled as to the real source of the letter. (8a of the Appendix) While holding that the Administrative Law Judge did not err in finding that the May 8, 1990 letter was insufficient to set aside the election, the Court was "discomforted by the fact that the letter was mailed at such a time as to afford Hudson's little opportunity to respond to the gross misrepresentation contained therein" and added that it "will continue to review cases arising under *Midland National Life* and *Van Dorn* very carefully." (8-9a of the Appendix) The Court concluded that it was affirming the decision of the Board "[d]espite some reservations." (12a of the Appendix)

REASONS FOR GRANTING THE WRIT

A. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE BOARD'S FAILURE TO ADHERE TO A STANDARD REGULATING PRE-ELECTION MISREPRESENTATIONS THAT PROTECTS THE RIGHT OF EMPLOYEES TO FREE AND FAIR ELECTIONS.

This Court has declared that it is the duty of the National Labor Relations Board to establish procedures and safeguards necessary to ensure a free and fair choice of bargaining representatives. *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). While the Board has discretion in how to protect and ensure that free and fair choice, this Court has not hesitated to strike down Board election standards incompatible with the spirit and meaning of the Act. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

The Board's current, laissez-faire approach to deceptive pre-election propaganda distributed by employers and unions fails to fulfill the Act's promise of free and fair elections. As announced by the Board in *Midland National Life:*

> [W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.

263 N.L.R.B. at 133.

The Board conducts thousands of elections each year involving hundreds of thousands of working men and women yet the *Midland* rule permits both employers and unions to campaign, without challenge, on the basis of misrepresentations and distortion of the issues, as the UAW did on the eve of the election at Hudson's Westland store.

1. The Erratic History of the Board's Regulation of Pre-Election Propaganda

The current, permissive Board standard, quoted above, cannot be said to have evolved over the years, for evolution implies development and refinement. Rather, its history is simply one of the Board bouncing back and forth between two diametrically opposed standards of conduct, with each 180 degree change in course typically directed by a bare majority of the Board in the face of vigorous dissent. "[R]egulation of campaign misrepresentation [is] perhaps the most erratic, fluctuating body of law in the entire field of labor-management relations." *Williams, NLRB Regulation of Election Conduct,* (Rev. Ed.) at 29 (University of Pennsylvania, The Wharton School, Industrial Research Unit, Labor Relations and Public Policy Series No. 8, 1985).

During the early years under the Wagner Act, the Board made little effort to regulate campaign propaganda. As the Board stated in *Maywood Hosiery Mills, Inc.,* 64 N.L.R.B. 146 (1945):

> We cannot censor the information, misinformation, argument, gossip, and opinion which accompany all controversies of any importance and which, perceptively or otherwise, condition employees' desires and decisions; nor is it our function to do so.

64 N.L.R.B. at 150.

In the mid-1950's, the Board began to consider standards for elections, recognizing that false campaign propaganda tends to

destroy the "laboratory conditions" required by the Board under *General Shoe Corp.*[4] in the conduct of elections. In *Gummed Products Co.*, 112 N.L.R.B. 1092 (1955), for example, the Board set aside an election where the union had deliberately misrepresented wage rates it had negotiated with another employer.

In the seminal *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), the Board, for the first time, articulated a test by which misrepresentations would be measured:

> [A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

140 N.L.R.B. at 224. *Hollywood Ceramics* was decided by the full five-member Board, without dissent.

After 15 years of relative stability under the fair and flexible *Hollywood Ceramics* standard, a 3 to 2 majority of the Board overruled that case, holding that it would "no longer probe into the truth or falsity of the parties' campaign statements," but would instead rely upon employees "as mature individuals who are capable of recognizing campaign propaganda for what it is." *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977). *Shopping Kart* was decided by a bare majority, including a somewhat reluctant Chairman Murphy, with Members Fanning and Jenkins dissenting. The majority relied, in part, upon a study of union representation elections reported by Professors Getman and Goldberg, wherein the authors claimed that voters are

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[4] 77 N.L.R.B. 124 (1948)

generally unaffected by union and management campaign materials.[5] Ironically, Getman and Goldberg earlier concluded that the opinions and actions of a voter's peers can be persuasive and that a voter is likely to be influenced by a family member, personal friend or fellow worker.[6]

Shopping Kart did not last long. Twenty (20) months after the decision was issued, the Board reversed itself again and prudently returned to the *Hollywood Ceramics* standard. *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). In *General Knit*, a 3-2 decision, a new majority held that *Shopping Kart* was "inconsistent with [the Board's] responsibility to ensure fair elections." 239 N.L.R.B. at 620.

Then came *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982), where the Board again rejected the *Hollywood Ceramics* standard for measuring election campaign misrepresentations and adopted today's anything-goes approach. Not surprisingly, Members Fanning and Jenkins dissented.

> For the second time in 5 years, a bare majority of the Board has abandoned the flexible and balanced *Hollywood Ceramics* standard for determining when election campaign misrepresentations have overstepped the bounds of tolerability and substituted an ultra-permissive

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[5] Getman and Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 Stan. L. Rev. 263 (1976).

[6] Getman, Goldberg and Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 Stan. L. Rev. 1465 (1975). Thus, in the instant case, the UAW's letter, passed off as a communication from "Fellow Workers," was enhanced in its power to mislead employees.

> standard that places a premium on the well-timed use of deception, trickery, and fraud.

263 N.L.R.B. at 133.

The Board's policy oscillations, typically triggered by slight changes in the Board's composition, have been the result of fierce tension between two competing points of view. Accordingly, although the question of deceit and misrepresentation by a campaigning party has not been addressed by the full Board since *Midland National Life,* a degree of uncertainty at the Board still exists. For example, in *AWB Metal, Inc.,* 306 N.L.R.B. 109 (1992), *enf'd,* 4 F.3d 993 (6th Cir. 1993), the Board reviewed a situation in which a petitioning union had circulated a handbill containing misrepresentations with respect to wage rates recently negotiated elsewhere. Following *Midland National Life,* a majority of the three member panel overruled the objection, but Member Radabaugh dissented. In Radabaugh's opinion, *Midland National*:

> [i]s valid only if the employees have had the opportunity to assess the statements of both sides. If one side makes a misrepresentation in circumstances where there is no opportunity to reply, the employees never get to hear the other side.
>
> They will then go to the polls with the misrepresentation fresh in their minds and with no effective response to it. In such circumstances, I would not permit the offending party to reap the electoral fruits of the misconduct.

306 N.L.R.B. at 110.

2. Reaction of the Courts of Appeals to *Midland National Life* — Further Confusion and Different Standards

Reaction of the Courts of Appeals to *Midland National Life* has not been uniform. While some Circuits have approved

Midland without reservation,[7] others have not. In *NLRB v. New Columbus Nursing Home, Inc*, 720 F.2d 726 (1st Cir. 1983), the Court enforced an order of the Board, which had overruled misrepresentation objections to an election based upon *Midland*, but noted that it did not fully endorse *Midland*.

> In so holding, however, we do not necessarily endorse application of the *Midland* rule to situations involving charges of more fundamental and clear-cut misrepresentations. The Board has a duty to provide reasonably for the employees' "unhampered freedom of choice" [citation omitted]. Some misrepresentations might be so material and fraudulent as to undermine the employees' freedom of choice, rendering their section 7 right to self-organization a nullity.

720 F.2d at 729.

In his concurring opinion, Judge Aldrich reasoned that *Midland*, while motivated by a desire to reduce backlog and lend finality to the election process:

> seems to be burning down the barn to get rid of the rats; an abnegation of the Board's recognized duty to ensure a fair and free choice of bargaining.

720 F.2d at 730.

The Seventh Circuit has likewise expressed reservations about *Midland*, indicating that it might not be accepted by that Court in all situations, but offering little guidance. *See NLRB v. Chicago Marine Containers, Inc.*, 745 F.2d 493, n.4 (7th Cir. 1984); *NLRB v. Affiliated Midwest Hosp. Inc.*, 789 F.2d 524, n.3

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[7] *St. Margaret Mem. Hosp. v. NLRB*, 991 F.2d 1146 (3d Cir. 1993); *U.S. Ecology, Inc. v. NLRB*, 772 F.2d 1478 (9th Cir. 1985); *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886 (2d Cir. 1983); *Certainteed Corp. v. NLRB*, 714 F.2d 1042 (11th Cir. 1983); *NLRB v. Monark Boat Co.*, 713 F.2d 355 (8th Cir. 1983); *NLRB v. Rolligon Corp.*, 702 F.2d 589 (5th Cir. 1983).

(7th Cir. 1986). *Cf., NLRB v. Lovejoy Indus., Inc.*, 904 F.2d 397 (7th Cir. 1990).

The Sixth Circuit has formulated its own exception to *Midland*. In *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), *cert. den.*, 469 U.S. 1208 (1985), the Sixth Circuit applied the general principle of *Midland*, but cautiously added:

> [W]e do share the First Circuit's reluctance to be bound by the *Midland National Life* rule in every case. There may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected.

736 F.2d at 348. *See also, NLRB v. Hub Plastic, Inc.*, 52 F.3d 608 (6th Cir. 1995), and the decisions of the Sixth Circuit in this case. (1a and 39a of the Appendix.)

It is apparent from the foregoing that the situation at the Court of Appeals level is far from clear, at least within the First, Sixth and Seventh Circuits. Unions and employers are left to speculate as to the meaning of the First Circuit's "more clear-cut and fundamental misrepresentations" standard and about the nature of those cases in which the Seventh Circuit might refuse to apply *Midland National Life*.

The Sixth Circuit has stated that it will not apply *Midland National* in cases where "the misrepresentation is so pervasive and the deception is so artful that employees will be unable to separate truth from untruth." Yet, the Court failed to order a second election in this case where, immediately prior to election, the UAW mailed a gross misrepresentation disguised as a message from Fellow Workers, leaving Hudson's no opportunity to respond.

B. CERTIORARI SHOULD BE GRANTED BECAUSE REGULATION OF PRE-ELECTION CAMPAIGN MISREPRESENTATIONS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Of the thousands of representation elections conducted by the Board each year, most involve campaigning by the parties and all involve communication with employees eligible to vote. It is the right of those employees to a free and fair election which should be paramount. As expressed by Board Members Fanning and Jenkins in their 1977 *Shopping Kart* dissent:

> Our elections are well known for the degree of participation by eligible voters, which far exceeds that in political elections where many voters appear to be sufficiently disinterested to allow their fellow citizens to decide the outcome for them.
>
> * * *
>
> It seems to us that this degree of participation is related to the nature of what is at stake: wages, job security, pensions, health benefits, vacation privileges, job conditions. All can be directly affected by the ballot cast by an employee. And that ballot can be directly and significantly affected by the campaign propaganda of the employer and the union.

228 N.L.R.B. at 1317.

The Board, however, has demonstrated an absolute inability to formulate and adhere to a standard for judging pre-election propaganda which is workable yet which protects the employees' free and fair choice in the election process. That inability has led to an understandable result: the prospect of differing and, in some cases, ambiguous tests being applied by Courts of Appeals in similar situations, as well as speculation that changes in the

Board's personnel may result in yet another change in its standard.

The Board has consistently spoken over the years about the "laboratory conditions" required for representation elections. Yet, as shown by the facts of this case, the Board has allowed eleventh-hour gross misrepresentations without an opportunity to respond to go unchecked. As the unanimous Board stated in *Hollywood Ceramics*:

> One of the factors which may so disturb these conditions as to interfere with the expression of this free choice is gross misrepresentation about some material issue in the election. It is obvious that where employees cast their ballots upon the basis of a material misrepresentation, such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisaged by the Act. . . .

140 N.L.R.B. at 273.

Recognizing that misrepresentations can have a major impact on elections, some Courts of Appeals have been troubled by the Board's most recent pronouncements and have modified the *Midland Life* standard or have indicated that *Midland* may not be accepted in every situation. This lack of uniformity and the Board's failure to abide by its own "laboratory conditions" standard have resulted in confusion and have seriously undermined confidence in the representation election process.

The labor-management community continues to be perplexed by this important question of federal law, the positions of the Courts of Appeals and by the possibility that future changes in the composition of the Board will again change the Board's view about voter response to last minute misrepresentations and the need to regulate election propaganda more closely. This question has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition and issue a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: June 10, 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAYTON HUDSON DEPARTMENT STORE COMPANY,
A DIVISION OF DAYTON HUDSON CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

Appendix

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0105P (6th Cir.)
File Name: 96a0105p.06

Nos. 94-6092/6281

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAYTON HUDSON DEPARTMENT STORE COMPANY, A DIVISION OF DAYTON HUDSON CORPORATION,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Intervenor.

ON PETITION to Review and Cross-Application to Enforce an Order of the National Labor Relations Board

Decided and Filed March 29, 1996

Dayton Hudson v. NLRB, et al. Nos. 94-6092/6281

Before: MERRITT, Chief Judge; WELLFORD and BATCHELDER, Circuit Judges.

HARRY W. WELLFORD, Circuit Judge. Petitioner Dayton Hudson Department Store Company ("Hudson") operates a chain of retail department stores in the Midwest. In 1990, some of the employees of Hudson's store at the Westland Mall in Westland, Michigan, began an effort to organize and bring in the UAW. On May 11, 1990, an authorized ballot of eligible workers took place; 274 votes were cast for the union and 179 against. Thereafter, Hudson filed timely objections with the NLRB, contending that the outcome of the election was tainted by a letter sent to all employees on May 8, 1990.[1]

The letter at issue, mailed just three days before the election, began with the greeting "Dear Fellow Hudson's Employee," contained a number of references to "we" and "us," and addressed anti-union arguments and tactics employed by Hudson. The letter falsely represented, among its other statements, that Hudson "claimed profits of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year . . . ."[2] In closing, the letter stated:

> With the UAW on the ballot, we have the opportunity to choose to balance the power between [Hudson headquarters] and us.

---

[1] Hudson also contended that the election process was tainted by other incidents involving the UAW, including: 1) a leaflet, handed out only hours before the election, containing inaccuracies; 2) the presence of two UAW officials and a pro-union employee in an area of the store ruled off-limits during the election; and 3) an alleged attempt by a UAW representative to intimidate anti-union employees with a pipe wrench.

[2] Both sides agree that this statement was grossly inaccurate. The sales of the Westland Hudson's store in 1989 — the year referenced in the letter — totalled $52.5 million and the profits only $1.4 million.

By our joining the UAW, we guarantee ourselves a voice in our future. On May 11 vote to give yourself a meaningful voice in decisions that impact your life—VOTE YES FOR THE UAW.

The letter purported to be authored by "Your Fellow Workers/The Westland Employees Organizing Committee," but the UAW concedes that it was actually prepared by a paid UAW representative.

In December 1990, the NLRB overruled Hudson's objections, holding that the letter did not warrant a new election under the standard set forth in *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982).[3] Accordingly, the Board certified the UAW as the exclusive representative of the Westland bargaining unit. Hudson, nevertheless, refused to negotiate with the UAW based on the company's belief that the union's certification was inappropriate. As a result of this recalcitrance, the UAW filed an unfair labor practice charge against Hudson.

On May 15, 1991, the NLRB ordered Hudson to bargain with the UAW. Two weeks later, Hudson moved to reopen the record on allegations of newly discovered evidence that forged authorization cards were used prior to the election to generate additional support for the union.[4] The NLRB denied Hudson's

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[3] In Midland National Life, the NLRB held: [W]e will no longer probe into the truth or falsity of the parties' campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.
Midland Natl Life Ins. Co., 263 N.L.R.B. at 133 (footnotes omitted).

[4] This new evidence was provided primarily by John Madgwick, an employee of and one-time union promoter at Hudson's Westland Mall store. Madgwick alleged, in a statement given on May 10, 1991, that he had personally forged a number of authorization cards.

motion, holding that the allegations even if true, were insufficient to warrant a new election under Midland National Life, because Hudson had not claimed that the cards were actually shown to any employees.

In October 1991, Hudson petitioned this court for review of the Board's refusal to reopen the record. In *Dayton Hudson Department Store v. NLRB,* 987 F.2d 359 (6th Cir. 1993), we remanded the case to the NLRB with instructions to reopen the record and conduct a "full inquiry into such questions as how many authorization cards were forged, the actual use to which those cards were put, when these incidents occurred, and whether and in what context any misrepresentations concerning the cards occurred." *Id.* at 367. This court also instructed the NLRB to re-evaluate the May 8, 1990 letter under the standard posited in *Van Dorn Plastic Machinery Co. v. NLRB,* 736 F.2d 343 (6th Cir. 1984), *cert. denied,* 469 U.S. 1208 (1985).[5]

A hearing pursuant to remand was held before Administrative Law Judge Ladwig from January 18 to 21, 1994. At this hearing, Hudson attempted to establish its forged cards allegations chiefly through the testimony of John Madgwick, cochairman of the Westland Employees Organization Committee.[6] Madgwick

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[5] In Van Dorn, this court indicated a "reluctance to be bound by the Midland National Life rule in every case." Van Dorn, 736 F.2d at 348. The Van Dorn panel went on to state that

> [t]here may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.

Id. (emphasis added).

[6] The proof also included a statement and affidavit given by Madgwick in 1991.

testified that the Organization Committee had been told that the UAW would not file an election petition until sixty-five percent of the bargaining unit had signed authorization cards. Madgwick further testified that, after an initial period of high interest, card signing slowed down. Fearing that the sixty-five percent mark would not be reached, Madgwick allegedly decided to attempt to revitalize the union's campaign by forging authorization cards. Madgwick testified that the main impetus for this plan was a telephone call from the organization committee's other cochairman, Mary Grab, in which Grab stated that she was going to forge cards to help reach the goal.[7]

Madgwick allegedly forged between ten and twenty cards and gave them to union representative Ray Westfall in a mall restaurant frequented by Hudson employees. According to Madgwick, the plan was to make show of handing the cards to Westfall in order to indicate additional union support in hopes of inducing undecided employees who might be present to "jump on the bandwagon." Madgwick testified that approximately fifty employees signed cards as a result of his activities, and he indicated that union representatives were fully aware that he had forged authorization cards.

At the conclusion of the hearing, ALJ Ladwig reaffirmed the NLRB's order to bargain. ALJ Ladwig found Hudson's forgery allegations to be a "total fabrication" and concluded that the May 8, 1990 letter had not affected the outcome of the election. The NLRB subsequently affirmed Ladwig's findings of fact and conclusions of law. This petition ensued,[8] raising the following issues: 1) whether the NLRB erred in holding that the May 8,

[7] Grab later testified that this was a "flippant, stupid remark" on her part, and she denied having forged any cards.

[8] The NLRB's motion for expedited enforcement of the Board's order, filed roughly one month later, was denied by this court.

1990 letter did not meet the Van Dorn standard for a new election; and 2) whether the NLRB's ruling on the unauthorized cards issue should be overturned due to circumstances surrounding the remand hearing and certain errors made therein by ALJ Ladwig.

I. STANDARD OF REVIEW

We do not "lightly set aside the results of a NLRB-supervised representation election." *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988) (quoting *NLRB v. First Union Management, Inc.*, 777 F.2d 330, 336 (6th Cir. 1985)). A party seeking to overturn the results of a representation election "has the burden to show that the election was not fairly conducted." *Dayton Hudson Dep't Store v. NLRB*, 987 F.2d at 363 (quoting *NLRB v. Bostik Div.*, 517 F.2d 971, 975 (6th Cir. 1975)). If the Board's findings are supported by substantial evidence, they will be upheld. Id.

II. THE MAY 8, 1990 LETTER

The National Labor Relations Act contemplates "unhampered freedom of choice" in selecting a bargaining representative. *International Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB*, 311 U.S. 72, 80 (1940). In attempting to safeguard employees' freedom of choice in the context of campaign statements, the NLRB has stated that it will not set aside an election on the basis of misleading representations alone. Midland National Life Ins. Co., 263 N.L.R.B. at 133. The Board will, however, intervene in "cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." Id.

Although this court has followed Midland National Life, it has expressed a reluctance to do so in every case. See Van Dorn Plastic Mach. Co., 736 F.2d at 348. In Van Dorn, we held that "[t]here may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." Id.[9] On remand, ALJ Ladwig and the NLRB concluded that the May 8, 1990 letter was not sufficient to warrant a new election under the Van Dorn standard. Hudson argues that this conclusion was erroneous.

Hudson maintains that the letter, issued only a few days before the election, impermissibly tainted its outcome. Hudson points out that the UAW's letter was not only untrue, but also deceptive in that it appeared to have been authored by "fellow workers." Hudson argues that this "deception" increased the persuasive force of the misrepresentation to such an extent as to negate voters' freedom of choice on the issue of whether or not to join the UAW.

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[9] This court recently elaborated on the Van Dorn standard in a case noted by the petitioner after briefs were filed. See *NLRB v. Hub Plastics, Inc.*, 52 F.3d 608,613 (6th Cir. 1995). In *Hub Plastics*, Judge Brown stated

> Van Dorn and Dayton Hudson stand for the proposition that although employees naturally treat campaign propaganda with skepticism, on occasion a misrepresentation may be, though not a forgery, so artful that this skepticism is overcome, resulting in employees believing that the campaign propaganda must absolutely be true. Such a misrepresentation may also be so pervasive that it is likely to influence a large enough group of employees to have a material effect on the election. While the source of the misrepresentation is certainly one factor in determining a misrepresentation's "artfulness," it is not dispositive. The ways in which a party supports the misrepresentation . . . may also be relevant in determining whether the misrepresentation was so artful as to overcome the employees' natural skepticism.

ALJ Ladwig and the NLRB found no merit in Hudson's position, holding that, although the misrepresentation was gross, it was not sufficiently pervasive or artfully made as to warrant a new election.[10] ALJ Ladwig reached this conclusion because no evidence was offered which showed: 1) that the contents of the letter did not mirror the sentiments espoused by committee while campaigning on behalf of the union; 2) that employees were misled into believing that the pro-union statements in the letter were not obviously campaign propaganda; or 3) that the employees would have any reason to believe that the organization committee members would have any special knowledge of company profits. Ladwig also noted that "among all the campaign propaganda, this was [only] one false statement in one long letter."

Upon reviewing the record, we hold that the ALJ did not err in concluding that the May 8, 1990 letter was insufficient to warrant a new election. It is difficult to assess how many employees may have been affected by the letter's extreme exaggeration of Hudson's profitability. Additionally, we acknowledge that some employees may have been deceived as to the real source of the letter. Nevertheless, in light of the large margin of victory enjoyed by the UAW and the fact that, prior to receiving the May 8, 1990 letter, voters were undoubtedly aware, in general, that the organization committee was allied with the UAW, we are not prepared to reverse the determination of the Board and the ALJ. We note, however, that we are discomforted by the fact that the letter was

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[10] The ALJ found that the letter was not within the scope of Midland National Life either. In this regard, Ladwig stated that

> an employee could reasonably be expected to recognize the letter as propaganda. It was received from the UAW Region 1, it bore the printed signature of the Union's organizing committee, it was critical of the Company and its antiunion "scare tactics," it was received shortly before the election, and it concluded: VOTE YES FOR THE UAW."

mailed at such a time as to afford Hudson little opportunity to respond to the gross misrepresentation contained therein. We stress that we will continue to review cases arising under Midland National Life and Van Dorn very carefully.

III. THE FORGERY ALLEGATIONS

On remand, ALJ Ladwig ruled against Hudson on the company's assertion that forged cards had tainted the outcome of the representation election at its Westland store. According to the ALJ, Hudson's allegations in this regard were a "total fabrication." The NLRB subsequently affirmed on this issue. On appeal, Hudson argues that ALJ Ladwig erred in concluding that the forged card incident did not occur. Upon reviewing the ALJ's extensive findings, however, we are disposed to conclude that they are supported by substantial evidence. Although the ALJ found witness Madgwick's testimony to be a "total fabrication," we hold only that there are sufficient bases to find for the union on the question of whether alleged forged authorization cards influenced the outcome of the election.[11]

IV. WAS THERE "FULL INQUIRY" INTO THE FORGERY ISSUE ON REMAND?

Hudson finally contends, for a number of reasons, that it was denied the "full inquiry" ordered by this court into its allegations of forged authorization cards. First, Hudson contends that the nearly four year delay between the occurrence of the relevant events in this case and the remand hearing created a perceived

[11] We cannot agree that Madgwick's testimony was a "total fabrication," because of Grab's "flippant" remark to Madgwick that she and her family members might also forge names, if needed, to bring in the union. Additionally, Madgwick's reporting of his forgeries to his employer and the union might have been contrary to his interests.

lack of credibility on the part of its witnesses due to the fact that their memories had faded. While we regret the length of the disposition in this case and acknowledge that this delay may have had a bearing on the some of the ALJ's credibility rulings, we hold that Hudson suffered no undue prejudice. Hudson had the opportunity to preserve the testimony of its witnesses in affidavits for subsequent use in refreshing their memories, but failed to do so. See *Kuzan Mfg. Co. v. NLRB*, 749 F.2d 362, 366 (6th Cir. 1984).

Next, Hudson contends that it was deprived of a "full inquiry" into its forgery allegations by an administrative error on the part of the NLRB. On the second day of the remand hearing, the Board admitted that it had inadvertently returned the authorization cards from the Westland Mall store, originally submitted to the Board in March 1990 along with the UAW's election petition, to the UAW in November 1992. Apparently, the Board was supposed to have returned authorization cards from another Hudson store in connection with a withdrawn election petition filed by the UAW. In any event, the UAW returned 268 Westland cards to the Board approximately two weeks after receiving them.

According to Hudson, this administrative mix-up explains why the alleged forgeries cannot now be located. Hudson theorizes that more than 268 cards were originally filed with the Board and that the UAW, knowing that a hearing was in the offing, culled out the forgeries and returned the remaining cards to the Board. This tampering argument was rejected by the Board as unsupported by any evidence. In fact, the Board noted that counsel for Hudson admitted that there was "no evidence or suggestion that what had been represented by the General Counsel or by [counsel for the UAW] is not entirely true." While Hudson acknowledges this statement, it contends that no "representation was made that all

of the cards [originally filed] were returned to the Board. No representations were made regarding the handling of the cards by the UAW while they were in its possession."

Contrary to Hudson's assertions, we do not believe that the Board's mishandling of the authorization cards denied the company sufficient inquiry into the forgery issue.[12] There is simply no credible evidence that more than 268 cards were originally filed with the Board, or that the UAW engaged in any impropriety while in possession of the cards. We do not agree, however, with the Board's assertion that Hudson's argument is merely a feeble "attempt . . . to resurrect its forged-cards allegation."

Finally, Hudson contends that it was unduly prejudiced by ALJ Ladwig's exclusion of certain testimony on the issue of whether Madgwick had a motive to undermine the election results. We generally review an ALJ's exclusion of evidence in this context for an abuse of discretion. *Manna Pro Partners, L.P. v. NLRB*, 986 F.2d 1346, 1353 (10th Cir. 1993); see *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531, 534 (4th Cir. 1985); *Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248, 254 (5th Cir. 1983).

In 1991, Hudson erased an $8,055.79 deficit in Madgwick's account.[13] At the remand hearing, the UAW asserted that this deficit write-off provided a motive for Madgwick to attempt to undermine the election results by concocting allegations of forgery. Hudson attempted to undercut this assertion by eliciting testimony from both Madgwick and Tom Rector, a UAW organizer at the Hudson's in Pontiac, Michigan, that Madgwick had

[12] Furthermore, we conclude that Hudson's argument in this regard is untimely because Hudson failed to raise this issue when the mistake came to light at the remand hearing.

[13] The ALJ found that Hudson had also eliminated deficits in the accounts of other commissioned sales consultants during the same time period.

told Rector of his forging activities at Westland and advised Rector to do likewise in connection with an October 1990 representation election at Pontiac. Counsel for the union took the position that whether cards were forged in the Pontiac election, which occurred five months after the Westland election, was irrelevant to the issue of whether cards were forged at the Westland store. ALJ Ladwig agreed, excluding the testimony on grounds that it exceeded the scope of the remand.

We conclude that any error in the exclusion of this testimony was harmless. Even if Madgwick's testimony had been admitted, neither the ALJ nor the Board would have accepted it in light of the fact that they found him to be a "most untrustworthy witness." Similarly, even if Rector's testimony had been admitted, we would still find supported by substantial evidence the ALJ's conclusion that Madgwick had motivation to undermine the representation election.[14]

V. CONCLUSION

Despite some reservations, we AFFIRM the decision of the NLRB in this case based on the analysis above.

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[14] In addition to concluding that the deficit write-off motivated Madgwick, the ALJ found that Madgwick was motivated to fabricate the forged cards incident because Madgwick had repeatedly expressed resentment at having to share bargaining responsibility with local UAW president Mary Grab.

Date of Entry: June 21, 1990

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

DAYTON HUDSON DEPARTMENT STORE CO.
Employer

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)
Petitioner

and

LOCAL 876, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO-CLC
Intervenor

CASE NO. 7-RC-19227

_____ /

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO THE ELECTION

Upon a petition filed on March 12, 1990, and pursuant to a Stipulated Election Agreement executed by the parties and approved by the Regional Director on April 4, 1990, an election by secret ballot was conducted on May 11, 1990, among the employees of the Employer in the following appropriate unit:

> All full-time and regular part-time selling and non-selling employees, including employees of leased

departments, employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, guards and supervisors as defined in the Act.

Upon the conclusion of the election, a copy of the Tally of Ballots, revealing the following results, was issued and served upon each of the parties in accordance with the current Rules and Regulations:

Approximate number of eligible voters	537
Void ballots	0
Votes cast for Petitioner	274
Votes cast for Intervenor	8
Votes cast against participating labor organizations	179
Valid votes counted	461
Challenged ballots	7
Valid votes counted plus challenged ballots	468

On May 18, 1990, the Employer filed timely objections to the election. The Regional Direction concluded that the Employer's objections raised substantial and material factual issues, including credibility resolutions, which could best be resolved through a hearing.

Accordingly, pursuant to the Regional Director's Order dated May 29, 1990, a hearing was held before me on June 6, 1990, at Detroit, Michigan. The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations. Parties who attended the hearing were represented and were afforded full opportunity to be heard, examine witnesses, and introduce relevant evidence.[1] Upon the entire

[1] Local 876, United Food and Commercial Workers Union, AFL-CIO-CLC, the Intervenor, although served with a Notice of the Hearing by certified mail, did not attend.

record in this case and from observation of the witnesses, I make the following report and recommendations.

THE OBJECTIONS

Objection No. 1:

> The UAW improperly reproduced a portion of the official ballot, marked with an "X" to indicate a vote for the UAW, and immediately prior to the election distributed it as part of its campaign literature.

The document referred to in this objection is an 8½ × 11 handout sheet admittedly produced by the UAW and distributed to employees at the store during the week of May 7, 1990, as part of its campaign literature.

A cursory examination of the handout reveals its title and subject "IT'S STRIKING TO SEE HOW WRONG DAYTON IS ABOUT THE UAW STRIKE POLICY". Following that caption is a quotation from the UAW Constitution and two paragraphs regarding strikes and collective bargaining. Below that are the words: "Vote UAW For MORE CONTROL Over Our Jobs", which is centered over a partial ballot showing squares labeled the UAW, No Union, and the Local 876 UFCW, with an X marked in the square for the UAW. The full name of the UAW is clearly spelled out in legible type across the bottom of the flyer over the words "Printed in U.S.A." The UAW admits that it reproduced part of the sample ballot on the Notice of Election in this case for insertion in the leaflet.

The Board has adopted the view that "an altered ballot that on its face clearly identifies the party responsible for its preparation is not objectionable and will not serve as the basis for setting aside an election." *SDC Investment*, 274 NLRB 556 (1985). In cases where the source of the altered ballot is not clearly

identified, it becomes necessary to examine the nature and contents of the material to determine whether the document is misleading. cf. *Archer Services, Inc.*, 298 NLRB No. 42 (May, 1990).

The leaflet herein clearly shows that it was a partisan offering and that it was produced and printed by the UAW. It contains no references to the United States Government or the National Labor Relations Board and no markings which would create the impression that it was produced by the NLRB. Although it contains a reproduction of a small portion of a sample ballot, which portion shows an "X" in the box labeled UAW, there is nothing in the contents of the flyer in general, or the reproduced portion of the altered ballot in particular, to mislead anyone into believing that it originated from the Board or that the Board favored one of the parties to the election. *Baptist Home for Senior Citizens, Inc.*, 290 NLRB No. 131 (1989); *BIW Employees Federal Credit Union*, 287 NLRB No. 45 (1987); *Rosewood Mfg. Co.*, 278 NLRB 722 (1986); *Professional Care Centers*, 279 NLRB 814 (1986); *C. J. Krehbiel Co.*, 279 NLRB 855 (1986); *Worths Stores*, 281 NLRB 1191 (1986).

Therefore, it will be recommended that Employer Objection 1 be overruled.[1]

Objection No. 2:

> UAW literature, distributed immediately prior to and on the day of the election, intentionally contained gross misrepresentations of material facts. This literature was timed to preclude any effective response.

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[1] In addition, in its post hearing brief, the Employer withdrew Objection No. 1 based upon *Archer Services, Inc.*, supra. I, therefore, recommend that said withdrawal request be approved.

The Employer submitted copies of the two documents which contain the alleged objectionable material. The first is a one-page flyer distributed by the UAW to employees at the store on the day of the election, May 11, which claims, *inter alia*, that persons named Mackey, Gibson and Watson "will retire with huge pensions and no health insurance premiums". (A copy of that document is attached hereto as Exhibit A).

The second document is a two-page letter dated May 8, 1990, which was signed "Your Fellow Workers The Westland Employees Organizing Committee", but was actually prepared by a District Representative of the UAW. According to unrefuted testimony by UAW witnesses, it was mailed to employees on the *Excelsior* list on May 8. (A copy of that document is attached hereto as Exhibit B). Part of its message is that the Employer "claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year". The Employer claims that it was unaware of the documents, particularly Exhibit B, until too late to refute their contents.

The UAW admits that it produced, mailed and/or distributed both documents. The Union presented testimony and evidence which shows that the Employer, too, distributed materials to employees prior to and on the day of the election. The issues of health insurance coverage and Employer profits were prevalent subjects in the pre-election campaigns of both the Employer and the UAW.

The Employer claims that Exhibit A wrongly infers that Hudson executives receive fully subsidized health care coverage while unit employees do not. The Employer's Group Human Resource Manager, Jane Stanton, provided credible testimony to the effect that only Gibson out of the three executives mentioned in Exhibit B is employed by Hudson's Stores and that he has the same health care coverage as the unit employees at the Westland

Store. She testified that Gibson and all Westland employees who retire before age 65 must pay part of their health insurance costs, and employees who retire after age 65 with enough years of service receive full-paid health insurance coverage. The other two executives mentioned in Exhibit A, Mackey and Watson, are employed by Dayton Hudson Corporation and are covered by a different health care insurance than Westland employees. Ms. Stanton was not sure what portion of health insurance costs, if any, Mackey and Watson would be required to pay after retirement under the Dayton Hudson Corporation plan.

Westland's total sales in 1989 were $52.5 million, and its profits were $1.4 million and not over $60 million as the UAW claimed in Exhibit B. The current store Manager testified that the annual volume of sales is not kept secret from employees, and one employee witness, Kay Perrie, credibly testified that she attended a store-wide employee meeting in early 1990 during which the prior store Manager announced that Westland's total sales in 1989 was over 50 million dollars.

It is well established in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), and its progeny, that the Board will no longer probe into the truth or falsity of the parties' campaign statements and will not set elections aside on the basis of misleading campaign statements. The Board further clarified that as long as the campaign material is what it purports to be, i.e., mere propaganda of a particular party and not an issue of forgery, the task of evaluating its contents will be left solely to the employees. In *John W. Galbreath, d/b/a John W. Galbreath & Company*, 288 NLRB No. 95 (1988), the Board ruled that "... the mere fact that a party makes an untrue statement, whether of law or fact, is not grounds for setting aside an election." In *Springfield Hospital*, 281 NLRB 643, 689 (1987),

the Union's pre-election misrepresentation two days before the election did not provide grounds for setting the election aside.

In the instant case the UAW's pre-election propaganda as demonstrated in Exhibit A, which was distributed to employes on election day, was arguably untrue with respect to health insurance coverage and/or costs. Exhibit B, which was mailed to employees on May 8, was concededly wrong with respect to the Westland Store's 1989 annual sales and profits. Nonetheless, these false statements were made openly in documents which the voters were able to recognize as campaign propaganda.[1] Moreover, there is no reason to conclude that employees would reasonably believe they could rely on their fellow employees or the UAW for absolute accuracy and expertise regarding health insurance coverage or 1989 Westland profits.

Based upon the foregoing as well as Board law for the past eight years which repeatedly has held that partisan pre-election campaign misrepresentations of fact do not amount to objection able conduct regardless of timing, I conclude that Objection 2 is without merit. *Midland National Life Insurance Company*, supra.; *Allis-Chalmers Corporation*, 278 NLRB 561, 562 (1986); *Riveredge Hospital*, 264 NLRB 1094 (1982); *Springfield Hospital*, supra.

Thus, I will recommend that Objection 2 be overruled.

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[1] In its post-hearing brief, the Employer suggests that Exhibit B amounts to fraud and/or forgery because it was signed by the employee committee but was actually prepared by an agent of the UAW. I do not believe the document rises to that level of deception because employees would not reasonably be inclined to assume that the material in Exhibits A and B originated exclusively from fellow employees and had no input from the UAW.

Objection No. 3:

> International Representatives and agents of the UAW stationed themselves and unlawfully campaigned for unionization in the immediate vicinity of the voting booths during the morning polling period,. These UAW agents were situated in such a manner that voters were required to pass within a few feet of them as the voters entered and exited the room containing the voting booths.

Employer witness Tim Glinn, a security guard, testified regarding the above objection, stating that he saw Bob King, Ray Westfall and John Madgwick, UAW Regional Director, Assistant Regional Director and employee organizer, respectively, enter the store at 10:10 a.m. on the day of the election, ten minutes after the polls had opened. They proceeded to the second floor restaurant area at one end of a corridor leading to the polling area. They then moved to a nearby candy counter and, finally, left at approximately 10:20 a.m. Glinn testified that Westfall made a trip to the restroom during this period of time and that he, Glinn, left for two to three minutes to make a phone call, during which time he did not observe the three men.

Ray Westfall gave testimony which was sometimes confusing and at other times improbable. He testified that the three men went to the restaurant area for the purpose of having a coffee, and were only there a minute or two before leaving without having coffee. He also testified that he spent about a minute going to the men's restroom off the same corridor which leads to the "buffeteria" where the polling was conducted. He further admitted that while on this trip he said hello to one voter who was sitting in the corridor waiting to enter the polling area.

Employee John Madgwick also testified that the three men went to the area in question to have coffee but were there no more than a couple of minutes. Madgwick said that he also visited the men's restroom during this period and that all three left the area after Westfall decided they should not be there. Bob King did not testify.

I credit the testimony of Tim Glinn as to this incident. Glinn's account of the incident did not vary during the examination, and his obvious attempt to give an accurate account is supported by a written memo made after the fact. Based upon Glinn's testimony, which I have credited, and the most probable parts of the testimony of Westfall and Madgwick, I conclude that Westfall, Madgwick, and King appeared on the second floor shortly after 10:10 a.m., approached and stood for a while at a chocolate candy counter in the deli area and for a while near the cashier counter in front of the restaurant. For short periods of time both Westfall and Madgwick were in the corridor on their separate ways to and from the restroom. Finally, at 10:20 a.m. they departed. I note from the record that this eight to ten minute period was a very small part of the total seven hours of polling in two periods lasting from 10 to 2 p.m. and from 4 to 7 p.m.

The restaurant cashier counter is at one end of the corridor, and the buffeteria polling area is at the other end. The doors to the public restrooms are off to one side of the corridor and situated next to the buffeteria. By all accounts the restaurant cashier counter is at least 30 to 40 feet from, and within sight of, the double doorway leading from the corridor into the polling area. The candy counter is not within view of the buffeteria doorway, but it is near a route voters would logically take to the polling area.

However, the record is devoid of any firsthand evidence that any of the approximately 537 eligible voters did, in fact, pass

within a few feet of the UAW representatives on their way to vote, as the Objection suggests. Also, based upon the record as a whole, I conclude that the three men were never in the "immediate vicinity of the voting booths". Except for Westfall's own admission that he said hello to one person while in the corridor outside the restroom, there is no evidence that anyone other than security officer Glinn noticed the three men. Glinn, of course, was not an eligible voter. Nor was any evidence proffered or adduced to establish that the three engaged in any sort of electioneering during this entire incident.

The Board has long been held that an agent of a party to an election who engages in sustained conversation with prospective voters waiting to cast their ballots, regardless of the contents of the remarks, engages in conduct which, in itself, necessitates a second election. However, not every chance, isolated, innocuous comment or inquiry by an employer or union official will necessarily void the election. *Milchem, Inc.*, 170 NLRB 362 (1968). It has been found objectionable for a supervisor to be stationed near a polling area for 10 or 15 minutes calling out to employees and talking to employees in line. *Antenna Department West*, 266 NLRB 909, 914 (1983) . However, when there are no prolonged conversation with voters, or there are no voters in the area, the incident is not of sufficient gravity to warrant setting aside the election. *Royal Coach Sprinklers, Inc.*, 268 NLRB 1029 (1984). Proximity to the polling area, standing alone, does not create objectionable conduct, whereas purposeful watching, or giving the impression of watching, does. *Electric Hose and Rubber Company*, 262 NLRB 186, 216 (1982). See also *NLRB v Del Rev Tortilleria*, 272 NLRB 1106 (1983), 823 F.2d 1135 (1987), 125 LRRM 3140; *Standard Products Company*, 281 NLRB 141, 164 (1986); *Darbar Indian Restaurant*, 288 NLRB No. 62, slip op. 7 (1988).

In the instant case the UAW agents were, for the most part, in a corridor area 30 feet or more from the polling area for no more than 8 to 10 minutes during the first polling period. They were never actually in the polling area, which was separated from the outside corridor by a double doorway. There is no evidence that they engaged in any electioneering with anyone waiting to vote. I conclude that the mere presence of UAW agents in such an area, without more, does not amount to conduct which warrants the setting aside of the election.

Thus, I will recommend that Objection No. 3 be overruled.

Objection No. 4:

> An International Representative and other agents of the UAW unlawfully intimidated and coerced eligible voters because of their participation on a rank and file "Vote No" Committee and their distribution of literature favoring No Union.

This objection relates to an incident which occurred approximately an hour before the polls opened on the morning of the election at the package pickup/customer service area which serves as an employee entrance. Several employee members of the pro-Union committee and three employee members of the Vote No committee distributed campaign materials to employees on their way into work that morning beginning at about 8:00 a.m.

It is undisputed that UAW agent Ray Westfall arrived at the Package Pickup entrance between 8:00 a.m. and 8:30 a.m. with campaign materials, and that shortly thereafter he went to his car and returned with a two-foot pipe wrench. Westfall testified that he brought the wrench for the purpose of opening a tank of helium which was to be brought to the scene by someone else. He then tossed the pipe wrench onto a nearby ledge and several feet from the three Vote No committee members. According to

Westfall, the wrench was never used, because it was too windy for helium inflated balloons that day.

Vote No committee member Geno Viar testified that Westfall pitched the wrench about 3 feet, in a "gesturely manner," onto a nearby ledge about 7 to 15 feet from where Vote No members were distributing flyers to employees entering the store. Viar's testimony was that he commented to his fellow Vote No representatives that he wondered if the pipe wrench was there to threaten them. He further asserted that no one else made any reference to the wrench and that Westfall never used it in any way.

While some might question the need for a pipe wrench to open a helium tank, it is undisputed that Westfall did nothing and said nothing to indicate an intention to use the pipe wrench for any other purpose. He did not touch it or move it after tossing it on the ledge. Nor is it alleged that he motioned toward it or threatened to use it in any way or for any purpose. Finally, it is not alleged that any employees other than those distributing campaign materials even saw the wrench.

During a representation election the Board must provide a "laboratory in which an experiment may be conducted under conditions as nearly ideal as possible to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). The proper test is whether the conduct involved reasonably tends to interfere with the free and uncoerced choice by the employees. *United Broadcasting Co. of New York,* 248 NLRB 403 (1980). It is well established that subjective reactions of employees are irrelevant to the question of whether or not there was, in fact, objectionable conduct. Rather, the test is based on an objective standard. *Emerson Electric Co.,* 247 NLRB 1365, 1370 (1980) enfd. 649 F.2d 589 (8 C.A. 1981).

Based upon an objective assessment of the instant situation, I conclude that Objection 4 is without merit. While the purpose of the wrench may have been left to speculation, there is nothing in the record evidence to establish that Westfall's action of tossing it onto a ledge several feet away from where employees were distributing campaign literature could reasonably have tended to coerce or threaten employees in the exercise of their right not to vote for the Union. Thus, it does not warrant the setting aside of the election.

Therefore, I will recommend that Objection 4 be overruled.

RECOMMENDATION:

I recommend that the Employer's request for withdrawal of Objection No. 1 be approved, or alternatively, that Objection No. 1 be overruled. I further recommend that Objections 2 through 4 be overruled and that an appropriate Certification of Representative be issued.

PLEASE TAKE NOTICE that the post-report procedures set forth in the Regional Director's Notice of Hearing in this case now become effective. Further, under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by July 5, 1990, in order to be timely, absent requests for extension of time properly made and granted. If no exceptions are filed, the Board may adopt the recommendations set forth herein without further consideration thereof.

Dated at Detroit, Michigan, this 21st day of June, 1990.

/s/ Marion E. Muma

Marion E. Muma, Hearing Officer
National Labor Relations Board
Seventh Region
Room 300,
Patrick V. McNamara Building
477 Michigan Avenue
Detroit, Michigan 48226

Date of Entry: December 26, 1990

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAYTON HUDSON DEPARTMENT
STORE COMPANY, A DIVISION OF
DAYTON HUDSON CORPORATION,
A MINNESOTA CORPORATION
Employer

and CASE 7-RC-19227

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 11, 1990, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 274 for the Petitioner, 8 for the Intervenor,[1] and 179 against both participating labor organizations, with 7 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief,[2] has adopted the hearing officer's findings and

[1] Local 876, United Food and Commercial Workers Union, AFL-CIO-CLC.

[2] We deny the Union's motion to file its brief out of time. See, Board Rules and Regulations, Sec. 102.69(f).

recommendations,[3] and finds that a certification of representative should be issued.[4]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

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[3] Member Oviatt notes that none of the Employer's objections pertained to Union misrepresentations in material distributed late in the campaign. In his view, under some circumstances (though not here) misrepresentations, even if they are not forgeries, should constitute grounds for setting aside an election. Thus, an especially serious and skillful misrepresentation occurring late in a campaign and dealing with an important campaign issue can interfere with a free and untrammeled choice by the employees. While agreeing that the misrepresentations at issue here do not rise to that level, Member Oviatt notes that the Board may sometimes be obliged to inquire, even in the absence of forgery, whether the alleged "misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and. . . their right to a free and fair choice will be affected." *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F. 2d 343, 348 (6th Cir. 1984). Member Oviatt believes that unless the Board monitors and prohibits these particularly egregious misrepresentations the Board fails to ensure that elections are conducted under the prerequisite laboratory conditions.

[4] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation that Employer Objection No. 1 be overruled.

Dated, Washington, D. C., December 26, 1990.

/s/ DENNIS M. DEVANEY

Dennis M. Devaney Member

/s/ CLIFFORD R. OVIATT, JR.

Clifford R. Oviatt, Jr., Member

/s/ JOHN N. RAUDABAUGH

John N. Raudabaugh, Member

(Seal) NATIONAL LABOR RELATIONS BOARD

Date of Entry: May 15, 1991

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAYTON HUDSON DEPARTMENT STORE COMPANY, A DIVISION OF DAYTON HUDSON CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO

CASE 7-CA-31476

_____ /

DECISION AND ORDER

On March 6, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7-RC-19227. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel,* 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On April 15, 1991, the General Counsel filed a motion to strike portions of the Respondent's answer and for summary judgment. On April 18, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 1, 1991, the Respondent filed a Response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response to the Notice to Show Cause the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[1]

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, a Minnesota corporation with its principal office and place of business in Southfield, Michigan, is engaged in

[1] We, however, deny the General Counsel's motion to strike portions of the Respondent's answer. Given that this is the initial test-of-certification proceeding, the Respondent's denials that the Union's certification was proper and that the Respondent violated the Act by refusing to bargain, while erroneous, are not frivolous or a sham. See *Mattie C. Hall Health Care Center*, 280 NLRB 1114 fn. 1 (1986).

the operation of retail stores. The Respondent maintains various stores in the State of Michigan, including a store located at 35000 West Warren, in the city of Westland, Michigan. During calendar year 1990, a representative period, the Respondent, in the course and conduct of its business operations, had gross revenues in excess of $1 million, and purchased and caused to be delivered at its Michigan facilities, clothing, furniture, household electronics, and other goods and materials valued in excess of $55,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its facilities in the State of Michigan, directly from points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held May 11, 1990, the Union was certified on December 26, 1990, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since on or about January 24, 1991, the Union has requested the Respondent to bargain and, since on or about January 31, 1991, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after January 31, 1991, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962); *Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction*

Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Dayton Hudson Department Store Company, A Division of Dayton Hudson Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential

employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

(b) Post at its facility in Westland, Michigan, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. May 15, 1991

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

DAYTON HUDSON DEPARTMENT STORE COMPANY, A DIVISION OF DAYTON HUDSON CORPORATION

Employer

Dated _____ By _____

(Representative) *(Title)*

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313-226-3219.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 91-6197/6314

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAYTON HUDSON DEPARTMENT STORE COMPANY, a Division of Dayton Hudson Corporation,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Applicant,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Intervenor.

ON PETITION for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Decided and Filed March 1, 1993

Before: KEITH and BATCHELDER, Circuit Judges; and WELLFORD, Senior Circuit Judge.

BATCHELDER, Circuit Judge, delivered the opinion of the court, in which WELLFORD, Senior Circuit Judge, joined. KEITH, Circuit Judge (p. 17), delivered a separate dissenting opinion.

ALICE M. BATCHELDER, Circuit Judge. Petitioner/Cross-Respondent, the Dayton Hudson Department Store Company ("Company"), owns and operates department stores, including Hudson's Department Stores. This action involves one such Hudson's Department Store, located at the Westland Mall in Westland, Michigan.

On May 11, 1990, pursuant to agreement of Intervenor, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("Union"), and the Company, the National Labor Relations Board ("Board") conducted a secret-ballot representation election at the Westland Mall Company store. Of the approximately 537 eligible voters, 274 cast votes for the Union and 179 against.[1]

On May 18, 1990, the Company filed timely objections to the election. On June 6, 1990, a hearing was held on the Company's objections. On June 21, 1990, the hearing officer issued a Report and Recommendations in which she recommended that the Company's objections be overruled and the Union be certified as the employee bargaining representative.

The Company then filed with the Board objections to the Report. On December 26, 1990, the Board issued a decision adopting the hearing officer's findings and certifying the Union as the exclusive bargaining representative.[2] The Union subsequently requested the

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[1]Eight votes were cast for an intervening union. There were also seven challenged ballots. Neither of these facts is of further relevance here.

[2]This decision was vacated by the Board on February 7, 1991 because of certain errors, and a new decision was substituted.

Company to bargain collectively. The Company, however, refused to bargain.

On February 1, 1991, the Union filed an unfair labor practice charge with the Board. Following the issuance of a complaint, on May 15, 1991, the Board ordered the Company to bargain with the Union. However, on or about May 30, 1991, the Company filed a Motion to Reopen Record. The Company alleged in its motion that immediately prior to receipt of the Board's May 15, 1991 Order, it had obtained newly discovered evidence that, prior to the election, the Union used forged authorization cards to generate additional support for the Union. The Company contended that because this newly discovered evidence, if accredited, would necessitate a new election, the Board was required to order the record reopened and a new hearing held.

On September 30, 1991, the Board denied the Motion on the ground that even if the allegation that the Union had used forged cards to misrepresent Union strength were accepted as true, under Board precedent, the use of forged authorization cards, unaccompanied by any allegation that the cards were actually shown to any employees, was an insufficient basis for reopening the record. On October 15, 1991, the Company petitioned this court for review. On November 12, 1991, the Board filed a cross-application for enforcement. On July 21, 1992, this court granted the Union's Motion to Intervene.

For the reasons that follow, we remand this case with instructions to reopen the record and take additional evidence and to reevaluate this case in light of the analysis set forth herein.

However, the February 7, 1991 decision made no substantive changes in the earlier decision.

I.

The Company points to four incidents as the basis for its objections to the representation election.[3] The first of these involves the distribution of a letter by the Union to eligible voters. On or about May 8, 1990, three days before the election, the Union mailed to all eligible voters a letter that began with the greeting "Dear Fellow Hudson's Employee." The letter contains a number of references to "we" and "us" and purports to be authored by "Your Fellow Workers/The Westland Employees Organizing Committee." However, the Union concedes that the letter, which contains facts and arguments critical of the Company and supportive of Union representation, was actually prepared by a paid Union representative. The letter alleges, among other things, that the Company "claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year . . ." (emphasis in original). The Board acknowledges that the hearing officer was correct in finding that the total sales of this store for the previous year, 1989, were $52.5 million and the profits only $1.4 million, not $60 million, as claimed in the letter.

The second incident involves a leaflet that was handed out by the Union on the morning of the election. The leaflet contains the following passage:

> Come Monday, [the Company] hope[s] to return to business as usual:
>
> * * *
>
> Business as usual, where employees can retire with 17 years of service and must pay $43/mo. to maintain their health insurance and take home only $40/mo., while [Company executives] Mackey,

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[3]One of the Company objections, Objection No. 1, was withdrawn by the Company after the hearing but before the hearing officer's report was issued.

> Gibson and Watson will retire with huge pensions and no health insurance premiums.

The Company contends that this statement grossly misrepresents that Company executives receive preferential treatment as to health benefits. The Company also alleges that the timing of this leaflet, which was handed out within hours of the time the polls opened, and of the letter, which apparently was received by eligible voters shortly before the election, made it impossible for the Company to respond meaningfully to the alleged inaccuracies.

The third alleged election impropriety involves the presence of two Union representatives, Ray Westfall and Bob King, and a pro-Union employee, John Madgwick, for approximately eight to ten minutes during the morning election period,[4] in the restaurant cashier counter and candy counter areas,[5] a part of the Company premises that a Board agent had ruled off-limits for Company and Union representatives during the election. As found by the hearing officer, these three individuals were present in an area near which voters logically would travel to reach the polling area. However, the hearing officer also found that the only encounter between any of these individuals and an eligible voter occurred when Westfall, while outside a restroom that is across the corridor from the candy counter and adjacent to the buffeteria polling area, said "Hello" to one employee. There was no evidence that any other voters observed the three individuals, that they engaged in any electioneering while in this area, or that they engaged in any electioneering whatsoever in the buffeteria room itself.

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[4]The polls were open on the day of the election from 10:00 a.m. to 2:00 p.m. and from 4:00 p.m. to 7:00 p.m.

[5]The buffeteria room, in which the voting took place, is approximately thirty to forty feet from the areas in which Westfall, King, and Madgwick were located.

The final incident to which the Company objected at the June 6, 1990 hearing involved allegedly coercive conduct by Union representative Westfall. On the morning of the election, in the presence of three employees who were handing out anti-Union literature, as well as a number of pro-Union employees, Westfall carried onto the Company premises a two-foot pipe wrench that the Union contended was to be used in opening a helium tank so that the Union could inflate balloons. However, according to the Union, because it was too windy for balloons, the wrench was not needed, and so Westfall "pitched" the wrench onto a nearby ledge approximately seven to fifteen feet away from the anti-Union employees. The Company contends that the Union had no need for the wrench because it knew the wind was too strong for balloons and, therefore, that Westfall's act of tossing the pipe wrench must have been intended to intimidate anti-Union employees. There was no evidence that Westfall or any other Union supporters uttered any threats or engaged in any other threatening conduct.

II.

We address two issues on appeal. First, we must determine whether the Board erred in refusing to set aside the election on the basis of the alleged election improprieties. Second, we must determine whether the Board erred in denying the Company's motion to reopen the record and hold a new hearing on the issue of forged authorization cards.

We first consider the pipe wrench incident. We find that the Board did not err in refusing to set aside the election on the basis of this incident. A party seeking to set aside the results of a representation election "has the burden to show that the election was not fairly conducted." *Tony Scott Trucking, Inc. v. NLRB*, 821 F.2d 312, 316 (6th Cir.) (per curiam) (quoting *NLRB v. Bostik Div.*, 517 F.2d 971, 975 (6th Cir. 1975), *cert. denied*, 484 U.S. 896 (1987)). If the Board's findings are supported by substantial evidence, they will be upheld.

Hickman Harbor Serv., a Div. of Flowers Transp. Co. v. NLRB, 739 F.2d 214, 218 (6th Cir. 1984). Moreover, proof of physical threats, without more, will not suffice; "[r]ather, specific evidence is required, showing not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Tony Scott Trucking*, 821 F.2d at 316 (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)).

The Union provided a reasonable explanation for the presence of the pipe wrench on the Company premises, namely, to assist in opening a helium tank. When that became unnecessary, Westfall tossed the pipe wrench onto a ledge approximately three feet from where he was standing and seven to fifteen feet from where the anti-Union employees were standing. There is no evidence that any employees besides the pro-Union employees and the three anti-Union employees who were present ever saw the wrench. There is also no evidence that Westfall made any threatening gestures with the wrench or otherwise implied that he would use it against those anti-Union employees who were present. The Board's decision that this incident did not reasonably tend to interfere with the free and uncoerced choice of employees is supported by substantial evidence and, therefore, will be upheld.[6]

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[6]The cases cited by the Company are distinguishable as involving more egregious facts. *See, e.g., NLRB v. Connecticut Foundry Co.*, 688 F.2d 871, 880-81 (2d Cir. 1982) (Where a drawing of skull and crossbones was displayed to several voters waiting in line to vote, one voter described the drawing to other voters immediately after leaving polling area, a pattern of threats and violence characterized the campaign for six months prior to the election, and the election was decided by a vote of 100-95, the court denied enforcement of the Board's order); *Exeter 1-A Ltd. Partnership v. NLRB*, 596 F.2d 1280, 1281-84 (5th Cir. 1979) (Where there occurred three separate incidents involving threats, swearing, and police involvement, and where the "highly belligerent and abusive" actions of union representatives were directed toward both management and employees, the combined effect of these "disruptive acts" necessitated denial of enforcement and setting aside of the election).

The Company also alleges that the presence for approximately eight to ten minutes during the election of Union representatives Westfall and King and pro-Union employee Madgwick in an area designated as off-limits by the Board agent warrants setting aside the election. The Company contends that voters going to or from the polling area would have had to pass by these individuals. The Company also points to the fact that Westfall admitted having spoken to one eligible voter during this time in the corridor adjacent to the buffeteria. The Company alleges that both Board precedent and court decisions, including a decision by this court, *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351 (6th Cir. 1983), require that a new election be held.

The Board has established a *per se* rule that certain types of election misconduct will, by themselves, warrant setting aside an election:

> [W]e believe that the sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election.

Milchem, Inc., 170 N.L.R.B. 362, 362 (1968). This *per se* rule, however, does not extend to *any* conversation, no matter how slight:

> [T]his does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles."

Id. at 363. Where the conversation is not prolonged, and where it does not involve party representatives' conversing with voters waiting in line to vote or in the actual polling area, *Milchem* is inapplicable. Instead, under these circumstances, "the Board makes a judgment, based on all the facts and circumstances, whether the

electioneering substantially impaired the exercise of free choice so as to require the holding of a new election." *Glacier Packing Co.*, 210 N.L.R.B. 571, 573 (1974). *See also NLRB v. Duriron Co.*, 978 F.2d 254 (6th Cir. 1992); *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 120 (6th Cir. 1992); *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1063 (11th Cir. 1983); *Boston Insulated Wire & Cable Sys. v. NLRB*, 703 F.2d 876, 881 (5th Cir. 1983).

The Company apparently contends that *Milchem* applies here. However, even were *Milchem* applicable at all where an encounter occurs outside the immediate polling area and does not involve an employee voting or waiting in line to vote, the isolated, innocuous comment by Westfall plainly would fall within the *de minimis* exception set forth in *Milchem*. *See, e.g., NLRB v. Michigan Rubber Prods., Inc.*, 738 F.2d 111, 115-16 (6th Cir. 1984); *NLRB v. Oesterlen Servs. for Youth Inc.*, 649 F.2d 399, 400-01 (6th Cir.), *cert. denied*, 454 U.S. 1031 (1981). Furthermore, a single chance comment, even if made in a designated no-electioneering area, to a single employee outside the immediate polling area during an election won by a margin of almost 100 votes falls far short of impairing the exercise of employee free choice within the meaning of *Glacier Packing*. *See NLRB v. Del Rey Tortilleria, Inc.*, 823 F.2d 1135, 1140-41 (7th Cir. 1987). Thus, this electioneering incident cannot be the basis for setting aside the election.[7]

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[7]The post-*Milchem* cases and Board decisions cited by the Company involve more extreme facts than the present case. *See, e.g., Kitchen Fresh*, 716 F.2d at 359 (remanding for a hearing and stating that, under *Milchem*, if union representatives engaged in "any conversation with employees who were waiting to vote," a new election would be required); *Bio-Medical Applications of Puerto Rico, Inc.*, 269 N.L.R.B. 827, 829 (1984) (where union representative, in violation of Board agent's instructions, remained for almost the entire election period in a waiting room adjacent to the polling area and spoke to four employees during this time, the *Milchem* rule was violated and the election was set aside).

The Company also alleges that both the letter that was mailed to eligible voters three days before the election and the leaflet that was handed out by the Union on election day are sufficiently egregious to require that this election be set aside. In evaluating the propriety of this campaign literature, we are guided by the Board's decision in *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982) and our decision in *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

In *Midland National Life*, which represents the Board's current position on election campaign statements,[8] the Board enunciated the following rule:

> [W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. As was the case in *Shopping Kart* [*Food Market, Inc.*, 228 N.L.R.B. 1311 (1977)], we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

Id. at 133. *Midland National Life* emphasizes the situations where voters are unable to recognize or evaluate union propaganda utilized in a deceptive manner so as to

---

[8]The Board has vacillated in this area of the law, having reversed itself three times between 1962 and 1982. *See NLRB v. Chicago Marine Containers*, 745 F.2d 493, 497-98 (7th Cir. 1984) (discussing the chronology of Board decisions in this area).

interfere with their free choice. Two years after the Board announced its *Midland National Life* rule, we decided *Van Dorn*, a case in which we applied a portion of a Board order addressing election misrepresentations. In dicta that mirrored certain concerns expressed in *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 730 (1st Cir. 1983), however, we also indicated our "reluctance to be bound by the *Midland National Life* rule in every case." *Van Dorn*, 736 F.2d at 348. We cautioned that

> [t]here may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.

Id. See also NLRB v. Superior Coatings, Inc., 839 F.2d 1178, 1181-82 (6th Cir. 1988); *Hickman Harbor*, 739 F.2d at 217; *Chicago Marine Containers*, 745 F.2d at 498 n.4. We continue to adhere to *Van Dorn* as representing a narrow but appropriate limitation on the expansive rule announced in *Midland National Life* -- namely, that where the pervasiveness of misrepresentation or the artfulness of deception during an election campaign renders employees so unable to separate truth from untruth that their free and fair choice is affected, an election must be set aside even in the absence of proof that forgery has occurred.

While the leaflet distributed by the Union on the day of the election, standing alone, does not constitute either a forged document under *Midland National Life* or a "pervasive" and "artful" misrepresentation under *Van Dorn*, nevertheless we think the leaflet bears upon the "free and fair choice" inquiry we must address. Unlike the May 8 letter, the leaflet was not addressed to "Fellow

. . . Employee," nor did it purport to be authored by "Your Fellow Workers." This document was in leaflet rather than letter form, which reinforced the impression that it was campaign propaganda rather than a personal message from fellow workers. Additionally, the leaflet concluded with a portion of a mock ballot stating, in large letters, "UAW YES," accompanied by a check mark. This characteristic of the leaflet may have indicated to a reasonable employee that the leaflet was not a personal message from co-workers, but partisan propaganda. Thus, although the leaflet, like the May 8 letter, did contain references to "we" and "us," we believe the leaflet was probably recognizable as propaganda (under *Midland National Life*). If this were the only basis for challenge, we would hold that the leaflet was not (under *Van Dorn*) so deceptive or artful that employees' free and fair choice was affected. But this was not the only basis for challenge, and the leaflet's timing, coupled with the deceptive letter of May 8, leads us to a closer examination of the implications of the letter.

The May 8, 1990 letter is more troublesome. In its February 7, 1991 Decision and Certification of Representative, which adopted *in toto* the findings and recommendations of the hearing officer,[9] the Board concluded that the May 8 letter did not run afoul of *Midland National Life* because employees reasonably would have recognized this letter to be campaign propaganda, and the fact that the letter was actually prepared by the Union and not by the Dayton employees did not render it a forgery because other "employees would not reasonably be inclined to assume that the material in [it] originated exclusively from fellow

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[9]In its December 26, 1990 Decision, the Board adopted the hearing officer's findings and recommendations, including its finding that the May 8, 1990 letter was not a forgery within the meaning of *Midland National Life*. Although this Decision was later vacated and an amended Decision substituted therefor, the parties agree that the Board, in the amended Decision, again adopted the findings and recommendations of the hearing officer.

employees and had no input from the UAW."[10] However the three-member panel of the Board that rendered this Decision apparently considered the election only under the *Midland National Life* standard and did not examine the election in light of *Van Dorn*.[11] We, therefore, remand this case to enable the Board to reevaluate, in light of our reaffirmation here of *Van Dorn*, whether the May 8, 1990 letter, even if not a proven forgery, nonetheless contained misrepresentation and deception pervasive and artful enough to interfere with employees' fair and free choice to such an extent as to require a new election.

Finally, we remand this case for an inquiry into the allegations surrounding the authorization cards. In its May 15, 1991 Order Denying Motion to Reopen Record, the Board concluded that, because the Company did not allege that the authorization cards actually had been shown to any employees, the forged-documents exception under *Midland National Life* was inapplicable and, therefore, reopening of the record was not required. The Board, although not citing in its Order to Section 102.48(d)(1) of the Board's rules and regulations, relied on this section which provides as follows:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with

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[10]Hearing Officer's Report and Recommendations, p. 5 n.3.

[11]In a footnote in the February 7, 1991 Decision, the Board noted Member Oviatt's view that, in more extreme circumstances than were present here, even where there was no evidence of forgery, "the Board may sometimes be obliged to inquire . . . whether the 'alleged misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and . . . their right to a free and fair choice will be affected.'" February 7, 1991 Decision at 2 n.3 (quoting *Van Dorn*, 736 F.2d at 348). Thus, there was at least some recognition among the Board members of the potential applicability of our *Van Dorn* decision under the proper circumstances.

> respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

29 C.F.R. § 102.48(d)(1) (1991). *See also NLRB v. Lane Aviation Corp.*, 615 F.2d 399, 400-01 (6th Cir. 1980). "The decision to grant or deny a new hearing under [Section 102.48(d)(1)] is within the sound discretion of the Board, and will only be disturbed by a reviewing court if the challenging party establishes an abuse of discretion." *May Dep't Stores Co. v. NLRB*, 897 F.2d 221, 230 (7th Cir.) (and cases cited therein), *cert. denied*, 111 S. Ct. 245 (1990).

The Board's position as to the forged authorization cards is that, because the Company did not allege that the Union actually showed these cards to any employees, the "forged-documents exception" under *Midland National Life* does not apply. However, as developed both in the briefs and during oral argument, at the time the motion to reopen the record was filed,[12] the Company only possessed evidence that forged cards had been used to

[12]Board regulations require that a motion to reopen the record to adduce additional evidence "shall be filed promptly on discovery of such evidence." 29 C.F.R. § 102.48(d)(2) (1991). The Company alleges that it learned of the forged cards immediately before receiving the Board's May 15, 1991 Decision and Order requiring the Company to bargain with the Union. On or about May 30, 1991, the Company filed its Motion to Reopen Record on the basis of newly discovered evidence. Given that further information concerning the allegedly forged cards is uniquely within the knowledge and control of the Union, the inability of the Company, in its Motion, to provide further

generate additional Union support, not that the cards actually had been shown to employees.[13] The Board, relying on *Midland National Life*, determined that, even if true as alleged, this use of forged cards, because it was tantamount to misrepresentation rather than forgery, would not require setting aside the election and, therefore, Section 102.48(d)(1) did not apply.

We disagree and find that the use of forged authorization cards to create a false picture of the extent of Union support, independent of whether the cards actually were shown to any employees, might constitute precisely the sort of pervasive misrepresentation and artful deception that we indicated in *Van Dorn* could, under the proper circumstances, be the basis for setting aside an election. In contrast to the use of a leaflet or even a letter that is distributed, and thus may at least be examined by employees to determine whether the representations made therein are true or untrue, the use of forged cards that are merely alluded to or otherwise utilized without being shown to employees deprives employees of the opportunity to evaluate the cards and determine that they are, or are not, propaganda. Arguably, therefore, such use of forged cards presents an even greater danger of misrepresentation and deception.

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details concerning the use of forged cards without benefit of a hearing is hardly surprising.

[13]The Company also contends that the Board's application of *Midland National Life* to forged authorization cards conflicts with the Supreme Court's decision in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). In that case, the Court held that where a union promised to waive the initiation fee for employees who signed union recognition slips before the election, the election had to be set aside because it did not provide employees with a fair and free choice of bargaining representatives. *Id.* at 277. The present case involves, not union recognition slips procured through economic inducement, but the use of forged authorization cards. However, although *Savair* thus is not directly applicable to the present case, the rationale of *Savair* -- that the Board ought not to appear to sanction actions that favor one party over the other, *id.* -- may have application where, as here, a party resorts to the use of forged authorization cards during an election campaign.

Because the use of forged cards to generate Union support, if this use prevented employees from separating truth from untruth and affected their right to a free and fair choice, would require a different result in the proceedings before the Board, the failure of the Board to grant the motion to reopen the record was an abuse of discretion. A hearing on this issue will ensure full inquiry into such questions as how many authorization cards were forged, the actual use to which those cards were put, when these incidents occurred, and whether and in what context any misrepresentations concerning the cards occurred.[14]

III.

This case is remanded to the Board with the instruction that the Board reevaluate the May 11, 1990 letter in accordance with the principles set forth herein, and with the further instruction that the record be reopened and a new hearing held on the issue of forged authorization cards.

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[14]We note that although this election was not decided by a handful of votes, a swing of approximately fifty votes from pro-Union to anti-Union would have changed the outcome of the election. On remand, in determining whether employee fair and free choice of a bargaining representative was affected, the Board, of course, may take into account this factor.

DAMON J. KEITH, Circuit Judge, dissenting. Because I disagree with the majority's position that *Van Dorn Plastic Mach. Co. v. NLRB*, 736 F. 2d 343 (6th Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985), limits the applicability of the National Labor Relations Board's election campaign statements rule announced in *Midland National Life Ins. Co. v. NLRB*, 263 NLRB 127 (1982), I must respectfully dissent.

The majority correctly states the Board's rule regarding election campaign statements as articulated in *Midland National Life* and acknowledges that this is the "current position" of the Board. However, the majority attempts to sidestep the rule by relying on what it concedes to be "dicta" from *Van Dorn*, where the majority opinion stated a "reluctance to be bound by the *Midland National Life* rule in every case." *Van Dorn*, 736 F.2d at 348. This Court did not hold in *Van Dorn* that the rule established in *Midland National Life* should be limited. Chief Judge Lively, the author of the majority opinion in *Van Dorn*, merely stated that there may be reasons to limit the applicability of *Midland National Life* where there is misrepresentation or deception surrounding elections, but no proof of forgery. *See id.* I cannot concur with the majority's reliance on dicta as binding authority. Thus, I would strictly adhere to the *Midland National Life* rule requiring proof of forgery to set aside elections.

In the instant case, the Board found that there was insufficient evidence that forged documents were used to influence the election. The rule in this Circuit is that Board decisions should not be lightly set aside, but upheld if supported by substantial evidence. *See NLRB v. First Union Management, Inc.*, 777 F.2d 330, 336 (6th Cir. 1985). I would affirm the Board's decision as supported by substantial evidence.

Date of Entry: March 24, 1994

JD—43—94
Westland, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DAYTON-HUDSON DEPARTMENT STORE COMPANY, A DIVISION OF DAYTON HUDSON CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO

Case 7-CA-31476

_____ /

Decision of Administrative Law Judge

JD—43—94
Westland, MI

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JD—43—94
Westland, MI

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BEFORE THE NATIONAL LABOR RELATIONS BOARD
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DAYTON-HUDSON DEPARTMENT
STORE COMPANY, A DIVISION OF
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INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW,
AFL-CIO

Case 7-CA-31476

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_____ /

DECISION

Statement of the Case

MARION C. LADWIG, Administrative Law Judge. On remand from the United States Court of Appeals for the Sixth Circuit, a hearing was held on January 18-21, 1994.

In an election held on May 11, 1990 at the Company's Westland, Michigan store, the vote was 274 for the Union (UAW), 8 for another union, and 179 against both. On December 26, 1990 the Board rejected the Company's objections and

certified the Union. On May 15, 1991 the Board granted a motion for summary judgment and ordered the Company to bargain.

On June 7, 1991 the Company filed a motion to reopen the record, alleging that it had obtained a statement from the Union's principal employee organizer to the effect that "numerous authorization cards" were forged and "intentionally used by the UAW to falsely portray union strength and support from a majority of the eligible voters." On September 30, 1991, in the absence of "any allegation that the employees were actually shown the allegedly forged cards," the Board denied the motion.

On March 1, 1993 the court remanded the case, instructing that "the record be reopened and a new hearing held on the issue of forged authorization cards." At the hearing the employee organizer, John Madgwick, falsely testified that the cards submitted to support the March 12, 1990 petition were "30 percent plus a few extras." He claimed that weeks later, when the cardsigning slowed, he forged 10 to 20 cards to start a bandwagon. In fact, the Union submitted 268 cards with the petition, a 61.8 percent majority of the alleged 433 employees in the bargaining unit.

In addition, Madgwick gave grossly conflicting versions of his purported forgeries in his May 10, 1991 written statement to the Company, in a June 6, 1991 affidavit, and in his January 13, 1994 testimony (in which he, changing his testimony, claimed that certain assertions he made in the affidavit were lies).

After weighing all the evidence, as discussed below, I agree with the Union that Madgwick's claim that he forged authorization cards is a "total fabrication."

I find that the whole basis of the Company's motion to reopen the record — that the Union used forged authorization

cards to portray a false picture of majority support — is grounded on fabricated evidence.

As further instructed by the court, a May 8, 1990 campaign letter is reevaluated.

Finding of Facts

A. *The Court's Remand*

On June 7, 1991, over a year after the Union won the May 11, 1990 election at the Westland mall store — by a vote of 274 for the Union, 8 for a Commercial Workers local, and 179 against both unions (C.P. Exh. 11) — the Company filed a motion, dated May 30, 1991, to reopen the record G.C. Exh. 1 (i)), alleging that it had

> discovered evidence, and obtained a statement from the principal employee/organizer, to the effect that Charging Party UAW had forged, or caused to be forged, *numerous authorization cards* prior to the May 11, 1990 election, which cards were intentionally used by the UAW to *falsely portray* union strength and *support from a majority* of the eligible employee voters. [Emphasis added.]

In its supporting brief (attached to G.C. Exh. 1 (i)) the Company alleged:

> In this case, by forging *numerous authorization cards*, the Union created a *false image*, or "outward manifestation" of *majority support* which operated as a "useful campaign tool"....
>
> ....

> They commenced forging cards when they had obtained valid, uncoerced cards from *only ⅓ of the voting unit.* [Emphasis added.]

In making these representations, the Company was relying on a written statement given by employee John Madgwick on May 10, 1991 to Company President Dennis Toffolo and company counsel (R. Exh. 3). Regarding the number of authorization cards he claimed he had forged, Madgwick asserted in the written statement: "Just how many I do not remember." He further asserted, "At the time I did this, we had about 165 cards signed."

To the contrary, the parties stipulated at the hearing (Tr. 190) that there are *"268 cards* [emphasis added] in the possession of Region 7, all stamped on March 12, 1990 [the date the Union filed the election petition]." Madgwick's claim of "about 165 cards" would be 38.1 percent (a little over a third) of the 433 employees alleged in the March 12, 1990 petition to be in the bargaining unit (C.P. Exh. 10). The actual number of 268 cards submitted with the petition was 61.8 percent of the alleged unit — a *clear majority.*

In its order denying the motion to reopen the record (G.C. Exh. 1 M at 3, 5-6), after observing that the Union "denies that any cards were forged" or "had any involvement in any alleged forgery," the Board denied the Company's motion, "absent any allegation that the employees were actually shown the allegedly forged cards."

Relying on the Company's representation of the facts, the court ruled, *Dayton Hudson Dept. Store v. NLRB*, 987 F.2d 359, 367 (6th Cir. 1993):

> We. . .find that the use of forged authorization cards to create a false picture of the extent of Union support,

> independent of whether the cards actually were shown to any employees, might constitute precisely the sort of pervasive misrepresentation and artful deception that we indicated in *Van Dorn (Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), discussed later] could, under the proper circumstances, be the basis for setting aside an election....
>
> Because the use of forged cards to generate Union support, if this prevented employees from separating truth from untruth and affected their right to a free and fair choice, would require a different result in the proceedings before the Board, the failure of the Board to grant the motion to reopen the record was an abuse of discretion. A hearing on this issue will ensure full inquiry into such questions as how many authorization cards were forged, the actual use to which those cards were put, when these incidents occurred, and whether and in what context any misrepresentation concerning the cards occurred.

The court remanded the case to the Board with the instruction that the record be reopened and a new hearing held on the issue of forged authorization cards and also with the instruction that the Board reevaluate the May 8, 1990 campaign letter (as discussed later).

B. *Purported Forging of Cards*

1. Successful organizing campaign

Robert King, the regional director of UAW Region 1A, was in charge of the organizing campaign. He was assisted by Assistant Director Ray Westfall and other staff representatives. (Tr. 61-62, 192-193, 199-203, 208, 230-231, 269, 281-282, 287; C.P. Exh. 5.)

The organizing at the Westland mall store began in January 1990. King's strategy for a successful campaign was to obtain the support of 65 percent of the employees before releasing authorization cards for them to sign and before filing an election petition. To obtain this support, he relied on volunteers in all departments and areas of the store, to constitute an informal organizing committee. The 30 to 40 (or more) committee members contacted the employees, seeking support for the Union and determining who were for and against it. (Tr. 193-195, 197-198, 204-206, 227-228, 279.)

In committee meetings and in meetings of employees in various union halls, the Union posted large poster paper on the walls, showing the various departments and areas and indicating the number of employees, how many were prounion, how many were undecided, and how many were not in favor of the Union. This "information gathering involving the large poster sheets," showing "numbers for each department," continued "right up to the election." (Tr. 65-66, 195, 198, 205-206, 209, 213-215, 279-281, 284-286, 297.)

Finally, after spending "a lot of time" assessing the union support at the store, through "committee meetings and the charts," Director King determined that the Union had achieved the support of 65 percent of the employees and decided to release the authorization cards for them to sign (Tr. 205-206, 227-228). The Union issued a notice to the employees (R. Exh. 2), announcing that "The UAW's cards will be handled at the membership meeting on *Sunday, March 4 at 6:30 p.m.*" About 175 or 200 employees attended the meeting and 161 of them signed authorization cards that evening. Committee members and others took cards back to the store to be signed. (Tr. 206-208, 228, 242, 273, 282-283.)

Cards were being signed at such a fast pace, showing "very positive and very strong" support, that on Thursday of that same week, March 8, 1990, Director King determined that the Union had the support of 65 percent of the employees. He authorized the filing of a petition and on Monday, March 12, Assistant Director Westfall filed it (in Case 7-RC-19227), alleging 433 employees in the unit. As found, Westfall submitted 268 authorization cards (61.8 percent) in support of the petition. (Tr. 190, 208, 212, 243, 264-266.)

After the Union filed the petition, the focus of the organizing committee was to maintain the Union's "support with the people who had committed support to the UAW." As credibly testified by Director King (who, by his demeanor on the stand, impressed me most favorably as a truthful, forthright witness), "we had the necessary cards to have an election. Now it was a matter of winning the election" (Tr. 210, 212-215):

> Q. At the point that the petition was filed on March 12th, but before you had the Excelsior list [about April 11], was there a continued push at that time to collect additional cards?
>
> . . . .
>
> A. No. We were very, very happy with the support we had and the really strong support, or I would call overwhelming support we had. . . .
>
> . . . .
>
> Q. What did [the organizing committee] do after the petition was filed?
>
> A. They went back and contacted all their coemployees and found out what the company was doing, what things the company was saying, what was the response to the different company literature. Would keep us abreast of current issues

on almost a day-to-day basis of what was going on in the store.

Q. Were they given duties with respect to card distribution or collection after the petition was filed?

A. No, if they got an additional card and they turned it in, that was fine.

Committee member Jacquelyn Garner credibly testified that the committee had no role in soliciting authorization cards after the Union filed the petition. The members "would accept a card if someone handed it in, but to actively solicit them, no." (Tr. 284-286.) Mary Grab, the cochairman of the committee, credibly confirmed that after the petition was filed, employees were not urged at union meetings to collect more cards, and no committee member that she knew of solicited cards (Tr. 244-245, 254). (By their demeanor on the stand, both Garner and Grab appeared to be truthful witnesses.)

As Assistant Director Westfall credibly testified, the only signed cards he received after filing the petition were about "a dozen or so" from Madgwick. Because "We already filed the petition," he told Madgwick that "those cards would be kept in the safe." (Tr. 266-268, 272.) The parties stipulated (Tr. 320) that there were 16 of these cards (about which Westfall testified), that one was a duplicate signed March 28, and that one was not dated. Among the other 14 cards, two were dated March 10 (the Saturday before the March 12 petition), two were dated March 12 (the date of the petition), two on March 26, one each on March 14, 17, 25, 27, and April 2 and 4 (all before the April 11 Excelsior list), and on April 19 and 25 (after the Excelsior list).

When the Company and Union met at the Regional Office to sign a stipulated election agreement and set a date for the election, the Company "said we will let you have this date [May 11] for the election if you allow us to include the leased areas." The Union agreed, "rather than delaying the election." (Tr. 229, 255.)

The Excelsior list, which the Union received about April 11, 1990 (C.P. Exhs. 6, 7), contained the names of 537 employees (104 more than the Union had calculated would be in the bargaining unit). The list included not only employees in leased departments, but also some persons who were no longer working there and some who had died (Tr. 209-211, 229, 285).

The organizing committee was not assigned to solicit the added employees to sign cards (Tr. 230-231, 244-245, 284). King credibly testified (Tr. 210-211):

> Q. After you received the Excelsior list, was there then a push to gather additional cards?
>
> A. There was a push and scramble to find out all the people who were on that list, to have somebody contact them and find out their support of the union. It wasn't necessary for a push of cards at that point, it was to build support and gain support among the additional people on the list.
>
> Q. Why do you say it wasn't necessary?
>
> A. Because we had filed the petition already, we had the necessary cards to have an election. Now it was a matter of winning the election.
>
> . . . .
>
> . . . [I]f somebody wanted to sign additional cards they could, but our main thrust or main push was to identify all

the people and then to win the support of those in the leased departments.

. . . .

Q. Did you ever tell John Madgwick that if 65 percent of the employees didn't sign cards that you would delay the election?

A. No.

When the members of the organizing committee sought out and talked to employees in the leased departments, the Union received their "overwhelming support" (Tr. 255). In the May 12, 1990 election, the Union received 274 of the 461 valid votes counted — a majority of 59.4 percent (C. P. Exh. 11).

2. Madgwick's fabricated testimony

a. *His motivation*

Furniture "sales consultant" John Madgwick played a prominent role in the organizing campaign. He attended the first organizing meeting in January 1990 at the home of employee Mary Grab and he and Grab were informally selected by the employees to be cochairmen of the organizing committee (Tr. 27-28, 60, 199, 201-202, 226). At the March 4, 1990 union meeting, where 161 of the employees in attendance signed authorization cards, he volunteered to use vacation time early that week to collect cards from employees who did not attend the meeting (Tr. 19, 68).

Madgwick collected cards at the Coney Island (a restaurant located in the mall near the store) on Monday and Tuesday, March 5 and 6. Grab relieved him after her store hours both those days and also on Wednesday, her day off. (Tr. 19, 37, 68-70, 243.) Madgwick turned the signed cards in to Assistant Director Westfall (Tr. 37, 264-265, 269-270, 283-284). As found, Director

King decided on Thursday, March 8, to authorize the filing of the petition, and the following Monday, March 12, Assistant Director Westfall filed it with 268 cards. Also as found, Madgwick turned in to Westfall the few signed cards that Westfall received between that time and the election.

After the Union won the election on May 11, 1990, the Union chartered a separate local for the Westland mall store employees. To avoid "bad feelings" between Madgwick and Grab, the Union set up the local to divide the top leadership in the local between two elective offices, a president and a chairman of the bargaining committee. The members elected Grab to be president and Madgwick to be the chairman. (Tr. 88-89, 218.)

During the following months there were various occurrences or expressed attitudes that may have influenced Madgwick in deciding to turn against the Union, to campaign against it at the Company's Fairlane mall store, and to give fabricated testimony in an obvious effort to overturn the Union's election victory at the Westland mall store.

Madgwick opposed Grab as president being involved in negotiations with the Company. Although being assured that as committee chairman he would be lead spokesman, he "was not happy with that." As Director King further credibly testified, Grab as president had a role in going out to other locals and Madgwick "did not seem to appreciate her getting that recognition." Madgwick thought that one person should be clearly in charge of the local union and should handle the responsibilities of both president and bargaining committee chairman. (Tr. 218-219.)

About September 1990, in the parking lot after a union meeting, Madgwick told Fairlane mall store employee Leonard Militello and other employee organizers that "we have to get off

the women's issues" and have the "big-ticket" employees (the higher-paid commissioned sales consultants in furniture, carpets, etc.) control this union. (Tr. 54-55, 301.)

Later, in March 1991, Madgwick attended a union meeting at the Fairlane mall store during the Union's organizing campaign there. After the meeting Madgwick told Militello his opposition to "the idea of seniority rights, people having a right to bump into his department that had more seniority than him." He also expressed his opposition to the local union president's having "the right to be at the bargaining table and to have input at the bargaining table." He said "we are losing control of the [organizing] campaign" and complained that "women's rights were becoming more and more prevalent and he did not want women to be involved in this thing. He wanted big-ticket to control this." (Tr. 301-304, 307.)

I discredit Madgwick's claim (Tr. 89) that "I don't know why I would be unhappy about" the local union president being able to sit in on bargaining sessions and that "I don't recall saying anything like that." I also discredit his claim (Tr. 90) that "No," he did not make statements to other employees that he wanted the big-ticket employees to control the local.

On April 27, 1991, as stipulated (Tr. 320-321), the Company erased a $8055.79 deficit in Madgwick's commission account, along with larger and smaller deficits in the accounts of other commissioned sales consultants in the Company's stores. Because of the deteriorating economy, as Benefits and Compensation Coordinator Owen Oakley credibly testified (Tr. 162-168), these employees had been drawing more money than their monthly commissions, and the accumulated deficits prevented them from earning more than their draw in high-sales months. I discredit Madgwick's claim (Tr. 58, 94) that this 1991 deficit was not erased until 1993 — long after he turned against the Union.

About April or May 1991 Jacquelyn Garner, a design assistant in the furniture department, observed "company people" going to Madgwick's desk and talking to him on a daily basis. While relieving the furniture receptionist during lunch, she was receiving phone calls from "company people asking to talk to John Madgwick." Two of the calls were from Company President Dennis Toffolo. (Tr. 288-290.) I discredit Madgwick's claim (Tr. 53) that Toffolo had not called him at work.

Meanwhile, Director King and Assistant Director Westfall were seeking a meeting with Madgwick and he was asking for a meeting with them (Tr. 41, 51-53). As King credibly testified, "We had heard some concern from employees that he was meeting with management" and, in particular, that he had met with President Toffolo (who became the head of the department store division after the Union's election victory at the Westland mall store). King credibly explained: "We had experience where Dennis Toffolo had met with people from the Pontiac store and had convinced them not to support the UAW." (Tr. 56, 216, 220.)

In Madgwick's meeting with King and Westfall at the Bakers Square Restaurant near the Westland mall store, Madgwick again expressed his overall concern about his and President Grab's roles in the local and repeated his contention that one person should be clearly in charge of the local union and handle the responsibilities of both president and chairman of the bargaining committee (Tr. 215-219).

Madgwick acknowledged in the meeting that he had met with President Toffolo (evidently referring to his meeting on May 10, 1991 with Toffolo and the attorney). It was in the meeting with King and Westfall that he made the claim about forging authorization cards. As King credibly testified, there had

never been any statement by anybody of "even the possibility" of forged cards and "I really questioned what was the motivation for him saying that." (Tr. 219-222.)

In Madgwick's June 6, 1991 affidavit (G.C. Exh. 2, first identified as C.P. Exh. 1), given in another proceeding, he swore that this meeting was held on Tuesday, *May* 21, 1991 (16 days before he gave the affidavit). At the January 18, 1994 hearing, however, he claimed (Tr. 41, 51-52) that "actually" it was the end of April, "*April* 21st [emphasis added], I believe." In view of his acknowledgment to King and Westfall that he had already met with Toffolo (evidently on May 10), I infer that May 21, 1991 is the correct date.

On May 31, 1991 Madgwick distributed a memo to the Westland mall store employees (C.P. Exh. 8), announcing that "I feel I must sever my association with the UAW." He acknowledged (Tr. 91) that after meeting with Toffolo, he went into the Fairlane mall store to campaign against the Union and "talked to employees and attempted to gain the employees' support against the UAW."

b. *Purported forgeries*

(1) False premise

As found, Madgwick first claimed that he had forged union authorization cards after the Company erased a $8055.79 deficit in his commission account and after Company President Toffolo telephoned him on the job (contrary to Madgwick's denial).

Madgwick made the claim in a written statement to Toffolo and the attorney in a meeting on May 10, 1991 (a year after the Union's election victory at the Westland mall store). At the

hearing he gave conflicting versions of the circumstances of that meeting (Tr. 107-109):

> Q. Did you have [the statement] written out when you went to the meeting?
>
> A. No.
>
> Q. No. You wrote it up during the meeting?
>
> A. During the talk.
>
> Q. You wrote it up after you had talked to attorney Tim Carroll and Dennis Toffolo?
>
> A. Actually I think I did it before I talked to either of them. I am not sure, but I think I wrote it up first before I talked to them at the meeting. I think—
>
> Q. You had the meeting and you don't talk about anything and you sit there and are writing out this statement and then you talk?
>
> A. Yes, I think that is how it happened. I am not positive, but I believe that is how it happened.
>
> . . . .
>
> Q. And you just start writing?
>
> A. They asked me to make a statement and I started writing the statement.
>
> Q. They didn't know what it was going to be about?
>
> A. No.
>
> Q. No discussion with them before you started writing?
>
> A. Not to my knowledge.

From his demeanor on the stand, Madgwick did not impress me as being a candid witness. I infer that in giving this conflicting

testimony, he was attempting to conceal his prior arrangement with President Toffolo that the attorney would be present to witness the statement concerning his claim that he forged authorization cards.

Upon reviewing the May 10, 1991 statement (R. Exh. 3), Madgwick's June 6, 1991 affidavit (G.C. Exh. 2), and his lengthy testimony at the remand hearing on January 18, 1994, I find it apparent that his various versions of the details of the purported forgeries are based on a false premise.

The false premise — belied by a stipulation of the parties at the remand hearing — is that the March 12, 1990 petition was supported by "only 1/3 of the voting unit" (the number that the Company represented to the Board and the court was the number of "uncoerced cards" when the forging of cards began). The parties stipulated (Tr. 190) that Region 7 was in possession of *268 cards*, "all stamped on March 12, 1990." These 268 cards, submitted as the Union's showing of interest on that date, constitute 61.8 percent of the alleged 433 bargaining unit employees.

(2) Madgwick's conflicting versions

(a) *Number of signed cards*

As found, Madgwick claimed in his May 10, 1991 written statement (R. Exh. 3) that at the time he forged cards, "we had about 165 cards signed."

At the remand hearing, Madgwick first testified (Tr. 31) that the March 12, 1990 petition was supported by "30 percent plus a few extras." He later testified (Tr. 70) that when the petition was filed, the Union had "Better than 30 percent" or "about 130, 140, in-between there." When shown his June 6, 1991 affidavit (G.C. Exh. 2 at 5), stating that "Within 3 days of the start of distributing

cards, we received 162 cards," he claimed (Tr. 72-73) that was the correct number of cards submitted with the petition.

That claimed number of 162 cards would be 37.4 percent of the alleged 433 employees in the bargaining unit. In fact, as found, instead of 162 cards being received within 3 days *after* the authorization cards were released for signature at the March 4, 1990 union meeting, there were 161 cards signed *at* that union meeting. I discredit Madgwick's so-called "guess" (Tr. 18, 67) that there were only 50 employees at the meeting (instead of 175 to 200, as found).

As further found, the only signed cards that the Union received after it filed 268 cards with the March 12 petition were 16 cards Assistant Director Westfall received from Madgwick, 1 undated and 15 dated from March 10 to April 25, 1990.

There is no claim that any of these 16 cards was forged (Tr. 320).

(b) *65 percent requirement*

As found, Director King followed a policy of obtaining the support of 65 percent of the employees before releasing authorization cards for signature and before filing a petition. In one of Madgwick's versions of the facts he recognized this policy, but elsewhere he distorted it, obviously to support his claim that cards were still being solicited after the petition was filed.

In his affidavit (G.C. Exh. 2 at 3) Madgwick gave his version of a telephone call he received from cochairman Grab, evidently during the week of March 4, 1990 when they were collecting cards at the Coney Island before the Union filed the petition on March 12. In Madgwick's words, "Grab said that *Bob King would not file a petition* [emphasis added] until at least 65% of the proposed unit signed cards." (This telephone call is discussed later.)

At the hearing, however, when claiming that the solicitation of cards continue *after* the petition was filed, he gave a different version of King's policy. He claimed (Tr. 19-20, 31-32):

> [W]e had to have 65 percent or better cards signed by employees *before Bob King would hold an election for us.*
>
> . . . .
>
> A. Bob King told us this.
>
> . . . .
>
> A. The petition was 30 percent plus a few extras. Again, *Mr. King would not hold an election* at Westland until we maintained or we got to 65-plus percent cards.
>
> Q. This was even after the official petition had been filed?
>
> A. Yes.
>
> . . . .
>
> A. He said *he would delay it* until we reached 65. [Emphasis added.]

I discredit this testimony as a fabrication. As found, King credibly denied that he ever told Madgwick he would delay the election if 65 percent of the employees did not sign cards.

(c) *Number of purportedly forged cards*

In Madgwick's May 10, 1991 written statement to President Toffolo and the attorney (R. Exh. 3), Madgwick denied knowing how many cards he forged, stating "Just how many I do not remember."

In his June 6, 1991 affidavit (G.C. Exh. 2 at 3-4), he twice stated that he forged "10 to 20" union cards. He also claimed (at 5) that the *total* number of cards turned over to the Union before

the election was "Approximately 274." At the hearing he claimed again (Tr. 30) that he forged between 10 and 20 cards.

I note that the court, in remanding the case (987 F.2d at 366-367), observed that "as developed both in the briefs and during oral argument," the cards had not been shown to employees. In Madgwick's June 6, 1991 affidavit (G.C. Exh. 2 at 4), Madgwick swore, "I did not show the forged cards to other employees." Yet, at the remand hearing, he claimed that he *had* shown forged cards to employees (Tr. 107):

> A. I told [employees] a lot more people are starting to sign, so they *all started signing again*, yes.
>
> . . . .
>
> Q. . . . .Did a lot more people sign cards?
>
> A. After I forged the cards, then *showed them the cards* and a lot more people started signing cards, yes.
>
> Q. What is a lot?
>
> A. *Fifty*, I can't give a number, just a lot more people were signing cards.
>
> Q. [Than the number of] Cards you forged?
>
> A. Yes. [Emphasis added.]

I discredit, as a fabrication, this belated claim that he showed employees forged cards.

I find that this testimony is fabricated for another reason. It is stipulated that the number of cards stamped March 12, 1990 (showing that they were submitted with the petition) was 268. If Madgwick had turned in to Westfall 10 to 20 forged cards in addition to the 268 cards, and if employees "all started signing again" and he also turned in those valid cards as well, the total number of cards turned in to Westfall would be far larger than the

"Approximately 274" cards that Madgwick claimed was the total number.

As found, Westfall credibly testified that the only cards he received after he filed the March 12 petition were the "dozen or so" kept in his safe — referring to 1 undated card, 1 duplicate card, and 14 others, none of which was forged.

(d) *When purported forgeries occurred*

Madgwick repeatedly testified that he did *not* forge any of the cards submitted with the March 12, 1990 petition (Tr. 73-74).

At the hearing, he first claimed that he forged cards "When it slowed down," about "Two weeks, a week later" after the petition was filed. He denied recalling when it was, claiming that it might have been "the next week, the following week." (Tr. 75.) If true, this would have been the third or fourth week in March. In his affidavit (G.C. Exh. 2 at 3) he claimed that he forged union cards "from about late March 1990 to about early April 1990." Yet, he gave inconsistent testimony at the hearing, claiming (as discussed below) that he took names from the Excelsior list, which was dated April 11, 1990.

Although the Union had already made a 61.8 percent majority showing of interest, submitting 268 cards with the March 12 petition, Madgwick claimed that "When we got *between 40 and 50 [percent]* is when [the cardsigning] really slowed down" (Tr. 76, emphasis added). Previously, in his June 6, 1991 affidavit (G.C. Exh. 2 at 5), Madgwick swore: *"Thirty percent* [emphasis added] of the employees had signed union cards before the decision was made to forge union cards."

(e) *Names used in purported forgeries*

Madgwick also gave conflicting testimony about the names he forged. He insisted that he could not recall any of them. He first claimed, in his May 10, 1991 statement to the Company (R. Exh. 3), that "I used some employees names and *just anyones* [emphasis added]."

In his June 6, 1991 affidavit (G.C. Exh. 2 at 4), he swore:

> I forged the names of those *employees who had stated they were interested in the UAW,* but had not signed cards. I also forged the names of *employees who stated that they were not interested in the UAW.* I cannot recall the names of those signatures I actually forged. [Emphasis added.]

At the hearing he gave various versions of the names he used. He first testified (Tr. 30-31):

> A. Most of them were off the Excelsior list, yes.
>
> Q. Were there any other names?
>
> A. Yes.
>
> Q. Approximately how many other such names?
>
> A. A few. I have no idea how many names were on the Excelsior list. No.
>
> Q. Were these just names you make up or something.
>
> A. Names of *acquaintances* I had known.
>
> Q. Do you remember any of the names that you filled in?

A. No. [Emphasis added.]

Later that same day he testified (Tr. 77-79):

Q. For the nonemployees, did you use names of *people you knew?*

A. *No, just out of the hat,* maybe somebody I met, I just put a name down. Maybe even a customer, I don't know. I couldn't tell you the names, I really can't.

Q. Did you make up the names or were they real names of people you knew?

A. More than likely real names, but I am —

Q. More than likely?

A. Yes.

. . . .

Q. For the *names that you made up,* did you write in a job title?

A. Yes.

Q. You just made those up, too?

A. Salesman, yes. [Emphasis added.]

Madgwick next claimed that the names he took from the Excelsior list were *not* employees he knew, that he "just took them off at random" (Tr. 82):

Q. You would put in the signature for the person?

A. Yes.

Q. *First* and last name?

A. *Yes.* [Emphasis added.]

I find that this last answer is obviously fabricated. As the Union points out in its brief (at 17), "the Excelsior list does not contain first names, although Madgwick claimed he copied both first and last names off this list"(C.P. Exh. 7).

(f) *Purported knowledge of Union*

As the Union also points out in its brief (at 14), Madgwick's May 10, 1991 written statement to the Company (R. Exh. 3) "does not accuse the Union of suggesting, participating in, condoning, or even knowing about his alleged forgeries."

In Madgwick's June 6, 1991 affidavit (G.C. Exh. 2 at 4, 6), he swore:

> In or around late March 1990 or early April 1990 I gave the cards I forged to Ray Westfall. I did not tell him that the cards were forged. . . .
>
> . . . .
>
> I do not know if either Ray Westfall or any other union representatives knew that I forged union cards. I did not discuss the card forging with the UAW. . . .The UAW did not ask me to forge union cards.
>
> . . . .I never told Westfall or any other UAW representative that I forged union cards until after the election in May 1990.

Contrary to these unequivocal sworn assertions, Madgwick claimed at the hearing that he did inform Westfall about forged cards before the election (Tr. 40):

> Q. What did you tell him or what did he tell you at that time?
>
> A. We were sitting at the table [at Coney Island] when I turned them in and I reached across and said, *here are some of the forged cards.* I handed them to him.
>
> Q. What did Mr. Westfall respond, if anything?
>
> A. *I didn't hear that.* [Emphasis added.]

On cross-examination, Madgwick claimed that he was lying in the affidavit (Tr. 95-96):

> Q. In other words, you lied?
>
> A. I did.
>
> Q. You knew you were under oath at the time you lied?
>
> A. Yes.
>
> . . . .
>
> Q. Is it your testimony that you lied, but you thought you had good reason to lie?
>
> A. Yes.

As a justification for changing his testimony, Madgwick claimed (Tr. 87) that when he gave the affidavit he had "a very strong relationship with Ray Westfall and I didn't want Ray Westfall involved in this."

I credit Westfall's denials and his testimony (Tr. 266-268, 271) that the first he learned about any allegation of forged cards was a year later when Madgwick told Director King and him at

Bakers Square that Madgwick had forged cards. I discredit, as a fabrication, Madgwick's repudiation of the earlier sworn assertions.

I also discredit, as a complete fabrication, Madgwick's following claim (Tr. 22) — contrary to Westfall's specific denials (Tr. 267-268):

> Q. What, if anything, did you do in response to this difficulty you encountered in getting more and more cards for Bob King?
>
> A. *I asked* Ray Westfall one time when we were walking towards Coney Island, we were having a slow time getting cards signed, *if I signed cards,* what happens to the cards that we turn in to him or to Bob King. Ray Westfall said, the cards will go down to [the] UAW safe, they will not leave there and no one will see them, no one will get them. You do what you had to do, but *if you are going to forge cards don't tell Bob King.* [Emphasis added.]

This conversation undoubtedly would not have occurred during the week before the petition was filed, when a large majority of the employees were signing cards. Neither would it have occurred after the petition was filed because, as found, Director King never told Madgwick that he would delay the election if 65 percent of the employees did not sign cards.

I also discredit Madgwick's testimony about forging cards to get more employees committed and "on the band wagon, to get the thing rolling again because it had slowed down" and his testimony about how he would turn in cards, including forged cards, to Westfall at the Coney Island *after* Westfall filed the petition. He claimed "we would show how many cards we have

and say eight more today, ten more today. We were very boisterous at Coney Island about signing cards." (Tr. 37-39, 49.)

I infer that Madgwick fabricated this testimony to support the Company's position on "the use of forged authorization cards to create a false picture of the extent of Union support." Westfall credibly testified (Tr. 269) that Madgwick delivered cards to him at the Coney Island only when Madgwick was there on Monday and Tuesday, March 5 and 6 (after cards were released at the March 4 union meeting). Moreover, cards were not turned in 8 or 10 at a time after Westfall filed the petition. As found, Westfall credibly testified that he received only about "a dozen or so" after that.

(3) Grab's telephone call

Madgwick testified about a telephone call that he claims was the cause of his forging authorization cards. I find, however, that although there was a telephone call, it was placed before the March 12, 1990 petition was filed — not afterward when Madgwick claimed he forged cards and not his version of the call.

In Madgwick's June 6, 1991 affidavit, he gave his version of the telephone call that he received from Mary Grab, cochairman of the organizing committee. Because of his statement in the affidavit (as quoted below) that Director King would not "file a petition" until they reached 65 percent, I infer that he received the call from Grab on Wednesday, March 7, 1990. That, as found, was Grab's day off when she relieved Madgwick at Coney Island where, on Monday and Tuesday following the Sunday, March 4 union meeting, he had been collecting signed authorization cards from employees. At that time, they were short a few cards of reaching 65 percent of the estimated 433 employees in the

bargaining unit. (The 65 percent would be 282 cards, 14 more than the 268 cards submitted with the March 12 petition.)

Madgwick asserted in the affidavit (G.C. Exh. 2 at 3-4):

> I forged the union cards *because* Mary Grab called me at home and told me that we could not get anymore cards signed. Grab said that *Bob King would not file a petition* until at least 65% of the proposed unit signed union cards. Grab told me that, "Paul [Grab's husband] is going to sign some cards. My daughter is here with her girlfriend and they said they would sign some cards. Why don't you sign some cards and your wife. And if you have neighbors, why don't you have them sign some?" I agreed, but I did not ask my wife or anyone else to forge cards. Grab did not tell me how many cards she actually forged or if she in fact forged any union cards. This was the first and only discussion I had with Mary Grab about forging cards. [Emphasis added.]

I find the evidence to be clear that such a telephone call could not have caused Madgwick to forge authorization cards. The next day, March 8, Director King authorized the filing of the petition. Madgwick concedes that he did not forge any cards that week, before the petition was filed on March 12. After the petition was filed, there was no need to obtaining additional cards to enable King, under the 65-percent policy, to "file a petition."

At the hearing, Madgwick completely omitted any reference to King's not being willing to "file a petition" until 65 percent of the employees signed cards. He instead implied (Tr. 22-23, 29-30) that he received Grab's telephone call *after* the petition was filed, by claiming (falsely, as found) that he had already discussed forging cards with Assistant Director Westfall.

Grab acknowledged that she placed such a call to John Madgwick, calling him (Tr. 248) "just to touch base." She credibly testified (Tr. 246, 248, 252):

> A. I called John at home one day and it was a flippant, stupid remark and I just said, hey, I can sign cards and Paul can sign cards and my daughter and her friend can sign cards, and it was a stupid remark made to lighten the situation. It was a very intense [time], and we had never been through an election or situation like this before and it was just to kind of relieve tension. I said it and then it was done and forgotten.
>
> . . . .
>
> A. I don't recall him saying anything. . . .
>
> . . . .
>
> A. . . . [I]t was just something to break the ice, something to laugh about briefly. It was a very stupid thing to do. Therein lies my guilt.
>
> . . . .
>
> Q. Other than signing your own card, did you sign anybody else's card?
>
> A. No.

I infer that Madgwick was aware at that time that Grab was not serious. But even if not, he later realized that she was not serious about forging cards, because she never mentioned the subject again and never gave him any forged cards to turn in to Westfall.

I find that Madgwick was a most untrustworthy witness.

3. Other purported forgeries

After Madgwick conceded that he did not forge any of the (268) authorization cards that were submitted to support the March 12, 1990 petition, the Company called four other witnesses to testify about alleged forgeries.

One of them, former employee Winifred Wiacek, answered "65 percent" to a leading question about the number of cards required before "proceeding to an election" (Tr. 152):

> Q. Was there any goal or directive set by the UAW in terms of the number of cards it would insist upon *before proceeding to an election?*
>
> A. Yes, the 65 percent was accurate and it was to make sure that we won the election. [Emphasis added.]

She then explained, "I argued that ... 30 percent was enough to *file for an election* [emphasis added], but to win an election you needed more than 30 percent." I infer that she equated "proceeding to an election" in the leading question with "filing for an election." She next testified (Tr. 154):

> I felt no need to go forward [after the first two days of cardsigning] and get more cards, especially after we filed the petition to have an election. I thought to keep people on board and talk to them and make sure they are still with us, but to sign more cards, to me, at that time seemed rather fruitless.
>
> Q. In your personal effort did you stop attempting to have cards signed approximately at that time?
>
> A. My role wasn't so much getting cards signed, but to make sure people who signed, to keep them on board or that management didn't intimidate them.

Thus, this company witness confirmed that the Union did not require a 65-percent showing of interest before it would proceed to an election.

Another witness, Christine Amos, who was on the organizing committee but who did not solicit any cards, claimed that Director King said "He wanted 65 percent of the *Excelsior list* [emphasis added] in signed cards," because "if an employee signed an authorization card that made them feel more of a commitment to vote yes." She claimed that he said this "At least a dozen times" at union meetings that were held "Almost every Sunday" before the election. (Tr. 170-173). I note there were only *four* Sundays between the April 11 date of the Excelsior list and the May 12 date of the election. I also note that she was a social friend of Madgwick, seeing "each other socially outside of the worksite" (Tr. 175).

Although, as found, there were only 16 cards turned in to the Union after the March 12 petition, Amos claimed (Tr. 173-174) that she saw people handing in cards during that time "At least a dozen times or more, multiple cards. . .sometimes individual." I discredit these claims, as fabricated to support the Company's cause.

The evidence establishes that the two other witnesses, Rosemary Minni and Suzann Roberts, did engage in forgery, but both did so *before* the March 12 petition was filed.

Employee Rosemary Minni credibly testified that she signed the name of employee Nancy Sellar, with whom she had talked about the Union, but who was absent because of a mother with cancer. I discredit Minni's claim that although she signed her own card within the first 3 days after the March 4 meeting, she signed Sellar's card "maybe within the next two weeks" (that is, *after* the petition was filed). As discussed below, the card was one of

the 268 cards submitted with the March 12 petition. (Tr. 118-122.)

I also discredit Minni's claim, contrary to Westfall's credited testimony, that shortly before the election she overheard Madgwick and Westfall discussing forged cards and Westfall saying, "I did not hear that" — although she could remember virtually nothing else about the conversation (Tr. 111-118). She impressed me by her demeanor as not being a candid witness.

Employee Suzann Roberts credibly testified (Tr. 138-139):

Q. Did you sign any cards for other people with permission?

A. Yes.

Q. Those are situations in which the other person for some reason was unavailable to sign?

A. Yes.

An examination of the cards revealed that, besides Seller's forged card, there were only three other forged cards, dated March 5, 1990, among the 268 cards submitted with the March 12 petition (Tr. 320). To preserve the confidentiality of the cards, as the Company revealed in its brief (at 21-22): "During the final 2 days of the hearing, Judge Ladwig supervised the examination of authorization cards by experts retained by [the Company and Union], respectively." I infer that the three forged cards, dated March 5, were the cards signed by Roberts with permission.

I do not credit her testimony concerning *when* she forged these cards. According to her (Tr. 137-138), she had no difficulty soliciting signatures the "first couple of days" (March 5 and 6, 1990), but "After the first two or three days it dried up." She

claimed she heard "Over and over" from King and Westfall that they had to get 65 percent before "we would have a vote." She further claimed that when she "reached this period where the cards dried up," she worked "even harder" to get more cards and then signed cards for absent employees who gave their permission. To the contrary, the three forged cards are dated March 5, the first day after the cards were released for signature at the Sunday evening, March 4 union meeting.

I discredit as well Roberts' claim that she also forged "I would say a few cards, approximately three or five," using names of nonemployees. She denied having "any specific recollection of when you turned these in or what was said or what was done when you turned them in, who you gave the cards to" or any "specific information about that particular occasion." (Tr. 140, 144.) Like Minni, she did not impress me as being a candid witness.

I consider it obvious that the four forged cards (three with specific permission) that were included in the 268 cards submitted with the petition could not have influenced the outcome of the election in any way.

4. Contentions of the parties

Apparently referring in large part to the massive conflicts in Madgwick's versions of what happened, the Company contends in its brief (at 7) that "Not surprisingly, almost four years after the occurrence of the events being described, the testimony on the forged cards issue was at times conflicting and at other times simply confusing." To the contrary, I find that Madgwick deliberately fabricated testimony to help the Company's cause.

The Company ignores Madgwick's recognition — in his June 6, 1991 affidavit — of Director King's 65-percent policy for when to *file a petition*. It contends in its brief (at 30) that a

"critical fact," which "cannot be disputed," is that King "insisted upon a 65% threshold of signed authorization cards, as evidence of support from the bargaining unit, before he would *proceed with an election* [emphasis added]." To the contrary, as found, King's policy was to obtain the support of 65 percent of the employees before he would release cards for them to sign and before he would *file a petition.*

Disputing the credited evidence to the contrary, the Company contends (at 33) that "It is inconceivable that only 15 or 16 cards were collected during that two-month" period between the filing of the March 12, 1990 petition and the holding of the May 11 , 1990 election. It insists, "Where are the rest?" disputing Assistant Director Westfall's credited testimony that those few cards were the only ones he received after he filed the petition.

The Company concludes (at 40): "Finally, the Board failed to advise [the Company] of its error in returning the cards to the UAW until the second day of the hearing, thus depriving [it] of a meaningful opportunity to investigate the events of that two-week period or the UAW's handling of the cards." This refers to the Region's inadvertent return of the Westland mall store cards (instead of Fairlane mall store cards) on November 9, 1992 to the Union which, when its counsel discovered the error, hand-delivered them back to the Region 7 on November 23, 1992. (Tr. 185-188.)

The Company has not sought a continuance to investigate the matter. All 268 of the cards bear the Region's March 12, 1990 stamp (Tr. 190). The Company has made no suggestion of any motive for someone's tampering with the stamped cards, or how any tampering could have affected the outcome of this case.

The General Counsel contends in its brief (at 3) that Madgwick's testimony is "inherently unreliable." He concludes

(at 4-5) that "with no evidence of an organized union campaign of forging cards, no credible evidence of widespread forgery, and a record demonstrating that a maximum of less than two percent of all cards may have been signed by someone other than the employees named . . . in circumstances that may or may not have involved forgery, it is clear that the Sixth Circuit's *Van Dorn* standard of 'pervasive misrepresentation' has not been met" by the Company.

The Union contends in its brief (at 5-7) that there were no forged cards and that the evidence totally discredits the Company's principal witness (Madgwick) and "clearly and dispositively shows that forged cards played absolutely no role" in the organizing campaign:

> [T]he evidence of forged cards and their use was a *total fabrication* by an employee who became disgruntled by his inability to control the course of the organizing campaign. . . . [The Company] used his patently and obviously false testimony to delay the bargaining rights of its employees who voted for UAW representation by an almost 100 vote margin four long years ago. The paucity of evidence offered to support [the Company's] claims suggests that the [Company] frivolously initiated its motion to reopen the record in a conscious, deliberate attempt to hinder the bargaining process at the Westland mall store and the organizing efforts at its other area stores.

The Union also contends (at 25) that Madgwick took advantage of a joke made by Mary Grab to weave a fairy tale about forging cards and using them to induce employees to join the union cause.

5. Concluding findings

1. Credible evidence at the remand hearing establishes that no authorization cards were forged by John Madgwick or anyone else after the Union filed the petition on March 12, 1990, contrary to the Company's representations to the Court of Appeals for the Sixth Circuit.

2. Four authorization cards, signed during the week of March 4, 1990 and included in the 268 cards submitted with the March 12, 1990 petition, were forged without the knowledge of the Union.

3. These four cards (three of them signed with specific permission of absent employees) did not influence the outcome of the election in any way.

In direct response to the court's questions concerning the issue of forged authorization cards, I find as follows:

Regarding "how many authorization cards were forged": Four.

Regarding "the actual use to which those cards were put": They were submitted by the Union, without knowledge of the forgery, with its March 12, 1990 petition as part of its showing of interest, which consisted of 268 cards signed in the first week after the cards were released for signature at a union meeting on March 4, 1990.

Regarding "when these incidents occurred": Three of the forged cards were signed and dated March 5, 1990 with the specific permission of absent employees and the fourth card was signed that same week, before the March 12, 1990 petition was filed.

Regarding "whether and in what context any misrepresentations concerning the cards occurred": None.

C. Campaign Letter Reevaluated

1. Prior rulings

About May 8, 1990 (3 days before the May 11 election), as the evidence in Case 7-RC-19227 shows, the Union mailed in UAW Region 1A envelopes from the region's office (Tr. 28, 30-32, vol. 1) a letter to bargaining unit employees with the greeting, "Dear Fellow Hudson's Employee." The long letter (E. Exh. 3, vol. 2) contains arguments critical of the Company and its so-called antiunion "scare tactics." It concludes with an appeal for a Yes vote and bears the printed signature of the Union's organizing committee, as foliows:

> By our joining the UAW, we guarantee ourselves a voice in our future. On May 11 vote to give yourself a meaningful voice in decisions that impact your life — VOTE YES FOR THE UAW. [Emphasis in original.]
>
> Your Fellow Workers
> *The Westland Employees*
> *Organizing Committee* [Emphasis added.]

The letter contains a gross misrepresentation of the Company's profits. In the fifth of nine paragraphs, the letter states that the Company is "So profitable that they. . . (3) claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year" (emphasis in original). In fact, the total sales in 1989 were $52.5 million and the profits were only $1.4 million. The letter contains a number of references to "we" and "us," although it was prepared by a paid union representative.

On June 6, 1990 the Company was afforded a hearing on its objections before a hearing officer, who found that although the statement about $60 million in profits was false, it was "made openly" in a document that the voters were able to recognize as campaign propaganda. The hearing officer rejected the Company's contention that the document was a forgery because it was signed by the "employee committee," but was actually prepared by an agent of the UAW. "I do not believe the document rises to that level of deception because the employees would not reasonably be inclined to assume that the material...originated exclusively from fellow employees and had no input from the UAW."

In the hearing, the Company offered no evidence that any member of the organizing committee objected to the May 8, 1990 letter being issued in the committee's name, or that any employee was misled into believing that the prounion statements in the letter were not obviously campaign propaganda, but instead were solely opinions of individual committee members. It offered no evidence that any employee had any reason to believe that the organizing committee members had any special knowledge of company profits, or were a more authoritative source than the Union on that subject.

On December 26, 1990 the Board issued its Decision and Certification of Representative, adopting the hearing officer's recommendation to overrule this and other company objections and his finding that the May 8, 1990 letter was not a forgery within the meaning of *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

In *Midland National* the Board had held, 263 NLRB at 133, footnotes omitted:

> [We rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters *unable to recognize propaganda for what it is.* Thus, we will set an election aside not because of the substance of the representation, but because of the *deceptive manner* in which it was made, a manner which renders employees *unable to evaluate the forgery for what it is.* [Emphasis added.]

In its opinion, remanding this case to the Board, 987 F.2d at 365, the court cited its earlier opinion in *Van Dorn Plastic Machinery Co. v. NLRB,* above, 736 F.2d at 348. In *Van Dorn* the court had indicated its "reluctance to be bound" by the *Midland National* rule in every case, holding:

> There may be cases where no forgery can be proved, but where the *misrepresentation is so pervasive and the deception so artful* that employees will be *unable to separate truth from untruth* and where *their right to a free and fair choice will be affected.* We agree with the Board that it should not set aside an election on the basis of the substance of representation alone, but only on the deceptive manner in which representations are made. [Emphasis added.]

Then in its opinion, remanding this case, the court ruled, 987 F.2d at 365:

> We continue to adhere to *Van Dorn* as representing a narrow but appropriate limitation on the expansive rule announced

> in *Midland National Life*—namely, that where the *pervasiveness of misrepresentation or the artfulness of deception* during an election campaign renders employees so *unable to separate truth from untruth that their free and fair choice is affected,* an election must be set aside even in the absence of proof that forgery has occurred. [Emphasis added.]

Thus, under the Board's standards in *Midland National,* the misrepresentation must be made in such a "deceptive manner" to render employees "unable to recognize propaganda for what it is" and "unable to evaluate forgery for what it is."

Under the court's standards in *Van Dorn,* the misrepresentation (whether or not a forgery) must be "so pervasive" and the "deception so artful" that employees are rendered "unable to separate truth from untruth," affecting their right to a "free and fair choice."

The court remanded this case "to enable the Board to reevaluate, in light of our reaffirmation here of *Van Dorn,* whether the May 8, 1990 letter, even if not a proven forgery, nonetheless contains misrepresentation and deception pervasive and artful enough to interfere with employees' fair and free choice to such an extent as to require a new election."

2. *Contentions of the parties*

The Company, in contending that the May 8, 1990 letter was *not* campaign propaganda, represents that it was signed "Fellow Employees." By doing so, it ignores the fact that the letter was signed by the Union's organizing committee: "Your Fellow Workers *The Westland Employees Organizing Committee"* (emphasis added).

The Company contends in its brief (at 7) that "the entire document was a fraud—a forgery" and further contends (at 28-30):

> The May 8 letter was both "pervasive" and "artful." The pervasiveness of the letter is obvious as it was mailed to all potential voting employees. Furthermore, the letter, which grossly misrepresented Westland's profits, was admittedly drafted by the UAW. However, this letter was not signed by the UAW or its agent, but fraudulently *signed, "Fellow Employees."* This "artful" deception impaired the Hudson employees' ability to separate fact from fiction, thus affecting their right to free choice.
>
> Because the letter was *signed by* the Hudson's employees' *"Fellow Employees,"* the letter was not recognizable as propaganda conjured up by the UAW to persuade the Hudson's employees to vote in favor of the UAW. . . . Clearly, the signatures on the letter did not indicate that it was partisan nor was it propaganda recognizable as such.
>
> . . . . The misrepresentation was presented as true fact, and the format in no way indicated that it was an expression of opinion or campaign propaganda. Such a gross misrepresentation was so material that it undermined the employees' right to free choice, and requires that the election be set aside. [Emphasis added.]

The General Counsel contends in its brief (at 6) that "the disputed letter appears to be typical election campaign propaganda." It was "signed by the Union's organizing committee," it "encouraged employees to vote Yes in the election," and "the

employees would reasonably have recognized the letter as campaign propaganda." The General Counsel adds (at 6-7):

> The letter contained no altered financial reports or misquoted newspaper stories nor any other device to lend credence to its assertion in respect to the [Company's] profits. The fact that the letter was signed by the Union's organizing committee and urged employees to vote Yes, not only establishes that the document was not a *Midland National Life* forgery, but also demonstrates that there was no artfulness to the misrepresentation. A truly artful misrepresentation in the sense of *Van Dorn* would not have made it patently obvious to the reader that the document originated with a group that wanted the Union to win the election.

The Union contends in its brief (at 26-27) that the "Organizing Committee" of coworkers that signed the letter "did not attribute this information to any authoritative source with any special knowledge of these facts and did not claim any special expertise about financial issues." It further contends (at 28, 31, 33):

> The May 8, 1990 letter is typical campaign propaganda and was unambiguously identified as partisan union literature. It was signed by the "organizing committee" which was made up of Westland employees known to be prounion....The misrepresentation in the May 8 letter of the [Company's] profit figures was inadvertent and was proffered by employees with no special knowledge of such profit figures. The letter contained no other inaccurate information. That it was crafted by UAW organizers and signed by the "Organizing Committee" does not render it a forgery or a "deception pervasive and artful enough to interfere with the

employees' fair and free choice to such an extent as to require a new election."

. . . .

Nor was there trickery or deception involved in the identity of the letter's source. The May 8 letter falls precisely within the category of campaign propaganda as it is fully capable of being recognized as such.

. . . .

Here, although the text was drafted by a UAW organizer, the prounion sentiments expressed in the letter are known to be those of the employees of the Organizing Committee. Such surrogate authorship is akin to a management attorney drafting a letter for the Company president to send to all employees urging a "No" vote. The letter is not a deception because the attorney, a hired, outside consultant with no employment relationship, drafts the letter for the Company representative to sign.

The Union concluded (at 34) that because "its message was entirely consistent with the sentiments of the "Organizing Committee," its distribution immediately preceded the election, and it urged employees to 'VOTE YES,' the letter is easily recognizable as propaganda."

3. Concluding findings

a. *Under the Board's standards*

It appears clear that under the Board's standards (that the misrepresentation must be made in such a "deceptive manner" to render employees "unable to recognize propaganda for what it is" and "unable to evaluate forgery for what it is"), the misrepresentation in the May 8, 1990 letter of a $60 million profit was not made in such a deceptive manner.

When the Board decided in *Midland National* that "we will not set elections aside on the basis of misleading campaign statements," but will "intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is," 263 NLRB at 133, the Board stated some major considerations.

One was to ensure "the certainty and finality of election results, and minimize unwarranted and dilatory claims attacking those results." A second was that "As long as the campaign material is what it purports to be, i.e., mere propaganda of a particular party, the Board would leave the task of evaluating its contents solely to the employees." 263 NLRB at 131. A third is that the Board has "long viewed employees as aware that parties to a campaign are seeking to achieve certain results and to promote their own goals. Employees, knowing these interests, could not help but greet the various claims made during a campaign with natural skepticism." 263 NLRB at 132.

In the present case, shortly before the May 11, 1990 election, each bargaining unit employee received a letter through the mail in an envelope with the UAW Region 1A return address. The letter, dated March 8, 1990, contains arguments against the Company and urges a Yes vote for the Union. It bears the printed signature of the Union's Organizing Committee at the Westland mall store, "Your Fellow Workers."

The letter, as found, contains a gross misrepresentation. It states that the Company "claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year" (emphasis in original), whereas the total sales in 1989 were $52.5 million and the profits were only $1.4 million.

In agreement with the General Counsel and the Union, I find that an employee reasonably could be expected to recognize the

letter as union campaign propaganda. It was received from the UAW Region 1A, it bore the printed signature of the Union's organizing committee, it was critical of the Company and its antiunion "scare tactics," it was received shortly before the election, and it concluded: "VOTE YES FOR THE UAW."

As the Board specifically held in *Midland National,* as quoted above, "[W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements."

The only basis for setting aside the election on the basis of the May 8, 1990 letter would be to probe the authorship of the letter, which culminated the organizing committee's 4-month campaign in the store for the Union (since January 1990).

Such a probe would undercut one of the Board's major considerations in adopting the *Midland National* rule, to ensure "the certainty and finality of election results, and minimize unwarranted and dilatory claims attacking those results," as quoted above.

In the printed signature on the letter, the Union's organizing committee was described as "The Westland Employees Organizing Committee." If such a probe of authorship were made, should the Board require the drafting or approval of the letter by all members of the committee, or by only one or two of the committee leaders? Or, if Director King, Assistant Director Westfall, or other paid member of the staff who assisted in the union campaign prepared the letter, should the Board require *expressed* and not merely *tacit* approval, and if so, by some or all of the committee members? I note that it is only the Company, not any member of the committee, that has challenged the campaign letter as deceptive.

The Board would probably consider such a probe of the authorship of campaign literature — distributed with at least the tacit approval of the person or group whose signature appears on it — would be setting a bad precedent. For example, it would seem most unwise, in the absence of any indication of deception, to probe the authorship of a campaign letter issued in the name of a busy company president or store manager, to determine whether he granted his approval of the wording if the letter were prepared by a personnel manager, attorney, or outside consultant.

b. *Under the court's standards*

I find that similarly under the court's standards in *Van Dorn* (that the misrepresentation — whether or not a forgery — was "so pervasive" and the "deception so artful" that employees are rendered "unable to separate truth from untruth," affecting their right to a "free and fair choice"), the misrepresentation of company profits in the May 8, 1990 letter was not made in such a deceptive manner.

Although the misrepresentation was gross, the court in *Van Dorn,* as quoted above, specifically held that "We agree with the Board that it should not set aside an election on the basis of the substance of representation alone, but only on the deceptive manner in which representations are made."

In the present case, in the absence of any indication that the Union's organizing committee did not give at least its tacit approval for the May 8, 1990 letter being issued in its name, I find that the authorship of the letter by a paid union representative who was assisting in the campaign at the Westland mall store did not constitute misrepresentation "so pervasive" and the "deception so artful" that employees were rendered "unable to separate truth from untruth."

Although given the opportunity in the hearing before the hearing officer, the Company offered no evidence that the prounion message in the May 8, 1990 letter was not consistent with the sentiments of the Union's organizing committee (which had been campaigning in the store for the Union for 4 months), that the employees were misled into believing that the prounion statements in the letter were not obviously campaign propaganda, or that the employees would have any reason to believe that the organizing committee members would have any special knowledge of company profits.

The Company offered no evidence that the Union's preparation of the letter for the organizing committee in any way rendered the employees unable to separate truth from untruth. Even if employees believed that the Union would not be assisting the organizing committee by preparing campaign literature for it and believed that the committee members themselves composed and reproduced the long letter unassisted — although the letter was mailed to the employees in envelopes bearing the return address of the Union's regional office — there was nothing in the letter that would cause the employees to believe that the committee members would be more knowledgeable about the Company's profits than the Union.

Moreover, among all the campaign propaganda, this was one false statement in one long letter. It was neither a "pervasive" nor an "artful" deception.

I therefore find, upon reevaluating the May 8, 1990 letter in light of the court's reaffirmation of *Van Dorn,* that the letter did not contain "misrepresentation and deception pervasive and artful enough to interfere with employees' fair and free choice to such an extent as to require a new election."

Conclusions of Law

1. Because employee organizer John Madgwick's belated claim that he forged authorization cards is a "total fabrication," as found, there is no basis for setting aside the May 11, 1990 election on the Company's allegation that the Union forged authorization cards to create a false picture of the extent of union support.

2. A reevaluation, in light of the court's reaffirmation of *Van Dorn,* reveals that the misrepresentation of company profits in the May 8, 1990 letter was not "so pervasive" nor "deception so artful" that the employees were rendered "unable to separate truth from untruth," and did not interfere with the employees' fair and free choice to such an extent as to require a new election.

On these findings of fact and conclusions of law, I recommend the following[1]

ORDER

The National Labor Relations Board reaffirms its May 15, 1991 bargaining order.

Dated, Washington, D.C. March 25, 1994

/s/ Marion C. Ladwig

Marion C. Ladwig
Administrative Law Judge

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

National Labor Relations Board

Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation *and* International Union, Union Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL–CIO. Case 7-CA-31476

August 18, 1994

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On May 15, 1991, the National Labor Relations Board issued a Decision and Order in this proceeding granting the General Counsel's Motion for Summary Judgment and finding that the Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with the Union.[1] The Respondent was ordered to cease and desist and to take certain affirmative action to remedy the unfair labor practices.

Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the Sixth Circuit, and the Board filed a cross-petition for enforcement of its Order. On March 1, 1993, the court granted the Respondent's petition for review and denied the Board's cross-petition for enforcement.[2] The court held that: (1) the Board must reevaluate one of the two union campaign documents at issue in the Respondent's Objection 2 in the representation proceeding in Case 7-RC-19227;[3] (2) the Respondent was entitled to a hearing on the allegation that the Union had forged authorization cards, which was the

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[1] 302 NLRB 982.

[2] *Dayton Hudson Department Store v. NLRB*, 987 F.2d 359 (6th Cir. 1993).

[3] In its Objection 2, the Respondent alleged that the Union's May 8, 1990 letter intentionally contained gross misrepresentations of material facts about the Respondent's profits and that its distribution was timed to preclude any effective response. The court upheld the Board's decision to overrule Objection 2 insofar as the Respondent alleged that the Union's campaign flyer distributed on the day of the election, May 11, 1990, constituted a forged document. The court also upheld the Board's decision to overrule Objections 3 and 4.

subject of the Respondent's motion to reopen the record filed on June 7, 1991.[4] The court remanded the proceeding to the Board for the limited purposes set forth in its opinion.

On November 22, 1993, the Board remanded the proceeding to the Regional Director for Region 7 for the purpose of arranging a hearing before an administrative law judge limited to the allegation concerning the false authorization cards. The Board also ordered that the administration law judge's decision should include both the forged cards allegation and a reevaluation of the Union's May 8, 1990 letter to employees.

On March 25, 1994, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union answered the Respondent's exceptions, and the Respondent replied to the Union's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the

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[4] In its motion to reopen the record, the Respondent alleged that the Union had forged authorization cards and had used these to claim widespread support for the Union during the campaign.

judge's rulings, findings,[5] and conclusions[6] and to adopt the recommended Order.

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[5] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Here the judge based his findings not only on the demeanor of the witnesses, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. In particular, we agree with the judge's finding that John Madgwick's claim that he forged authorization cards is a "total fabrication." The Respondent errs in claiming that the delay of almost 4 years from the events at issue and the hearing about them impaired the judge's credibility findings. To the extent that delay may have adversely affected any testimony, it would have equally affected all witnesses, not just those of the Respondent. See *Bell Foundry Co. v. NLRB*, 827 F.2d 1340, 1343 (9th Cir. 1987). Moreover, the judge did not rely on imprecision and vagueness alone in making his credibility findings. He specifically cited demeanor as well as the panoply of considerations outlined above. We refer especially to the judge's analysis of the testimony of John Madgwick, Rosemary Minni, and Suzann Roberts. We find no error in the judge's credibility findings.

[6] In its exceptions, the Respondent asserts that Region 7's mishandling of authorization cards deprived the Respondent of the "full inquiry" mandated by the court on remand. The Respondent refers to the fact, which was revealed at the hearing, that on November 9, 1992, the Region inadvertently returned cards to the Union from the Respondent's Westland store rather than from the Respondent's Fairlane store. (The Fairlane store was the subject of a withdrawn election petition also involving the Union.) The Union returned the Westland cards on November 23, 1992, when the Union discovered the mistake. With reference to this incident, the Respondent's counsel acknowledged on the record that there was "no evidence or suggestion that what has been represented by the General Counsel or by [counsel for the Union] is not entirely true." The parties also stipulated that there were 268 Westland cards stamped with the Region's March 12, 1990 date, the day the Union filed its petition, bearing the names of employees in the bargaining unit at that time.

In its brief to the judge, the Respondent referred to this incident and asserted that it had been deprived of an opportunity to investigate the 2-week period that the Union had possession of the cards. The judge correctly dismissed the Respondent's arguments by noting that at no time had the Respondent sought a continuance; that the 268 cards bore the Region's March 12, 1990 stamp; and that the Respondent made no suggestion of any motive for tampering with the stamped cards or how such tampering could have affected the outcome of this case.

ORDER

The Board's Order reported in 302 NLRB 982 (1991), is reaffirmed.

Dated, Washington, D.C. August 18, 1994

JAMES M. STEPHENS, MEMBER

DENNIS M. DEVANEY, MEMBER

CHARLES I. COHEN, MEMBER

(SEAL) NATIONAL LABOR RELATIONS BOARD

The Respondent now states in its exceptions that the Union had the opportunity to sanitize the time-stamped cards by removing those that allegedly had been fraudulently signed. The Respondent refers to no evidence to support this allegation. We find no merit in this attempt by the Respondent to resurrect its forged-cards allegation. Judge Ladwig has rendered the "full inquiry" mandated by the court and found that John Madgwick's tale of forged cards is a "total fabrication." We agree with this finding. The Respondent's innuendo in no way contravenes it.

May 8, 1990

Dear Fellow Hudson's Employee,

During the union election campaign, Dayton Hudson has distorted the facts to lead us away from the real issues. It's important that we understand Dayton's scare tactics and not be swayed by their 'give us another chance' promise.

Dayton has had ample opportunity to treat us fairly and with dignity, but the management did not and does not seem to care about the individual worker. We are a line item expense used to increase profit for Dayton's and they are using all kinds of confusion and distortion to keep it that way.

One obvious desire of management has been to frighten us with strike threats. The real facts about strikes are; (1) only the people in our store will have the power under the UAW constitution to choose to strike; (2) there must be a two thirds vote by us, the employees, to authorize a strike; (3) 98% of all contracts are settled without a strike and (4) if we, by at least a two thirds majority, choose to strike the UAW's 760 million dollar strike fund pays each of us $100 per week subsistence pay and pays all health and life insurance premiums.

Management's line that 'a strike is the Union's only option' is also fiction. In the UAW we will have many other options including the massive buying power of 300,000 plus UAW families in southeastern Michigan. This is what Dayton doesn't want to talk about.

One of the particularly insulting arguments of management has been that better wages and benefits for us would jeopardize operations and profits. Dayton Hudson is the most profitable of the retail industry giants. So profitable that they; (1) bought out Marshall/Fields for over one billion dollars; (2) built a multitude

of Mervyn's and Target stores in Michigan costing millions and millions of dollars; (3) claimed a profit of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year and (4) pay huge and excessive wage, bonus and stock option compensation packages to their top Minneapolis management, and peanuts to us.

With this much money we have made for Dayton Hudson, why do they pay so many new hires only a minimum wage of $4.50 per hour? With this much money we have made for Dayton Hudson, why do we have to pay part of our health insurance premiums? And why does the amount of premium we pay keep going up and up? With this much money we have made for Dayton Hudson, why can't they provide a decent pension plan? How can workers with 25 plus years of service only be paid $100 to $200 per month?

Another theme Dayton is hammering on is that we don't need a third party, we should talk to them and give them another chance. The clear truth is that management has never listened to or acted on the issues important to us such as; ridiculous sales goals, performance plus, wage increases, an overpriced menu in the restaurant resulting in low tips, health insurance, pension and many other issues individuals have tried to raise. Is there a third party? YES and it comes from MINNEAPOLIS! Dayton management makes the decisions without us, we live the consequences!

In your final considerations about the question of union representation think about this adage: 'power corrupts and absolute power corrupts absolutely'. As individual employees we have no real power. Minneapolis management shows us no real respect, no real dignity. With the UAW on the ballot, we have the opportunity to choose to balance the power between Minneapolis and us.

By our joining the UAW, we guarantee ourselves a voice in our future. On May 11 vote to give yourself a meaningful voice in decisions that impact your life — VOTE YES FOR THE UAW.

In Solidarity,

Your Fellow Workers
The Westland Employees
Organizing Committee